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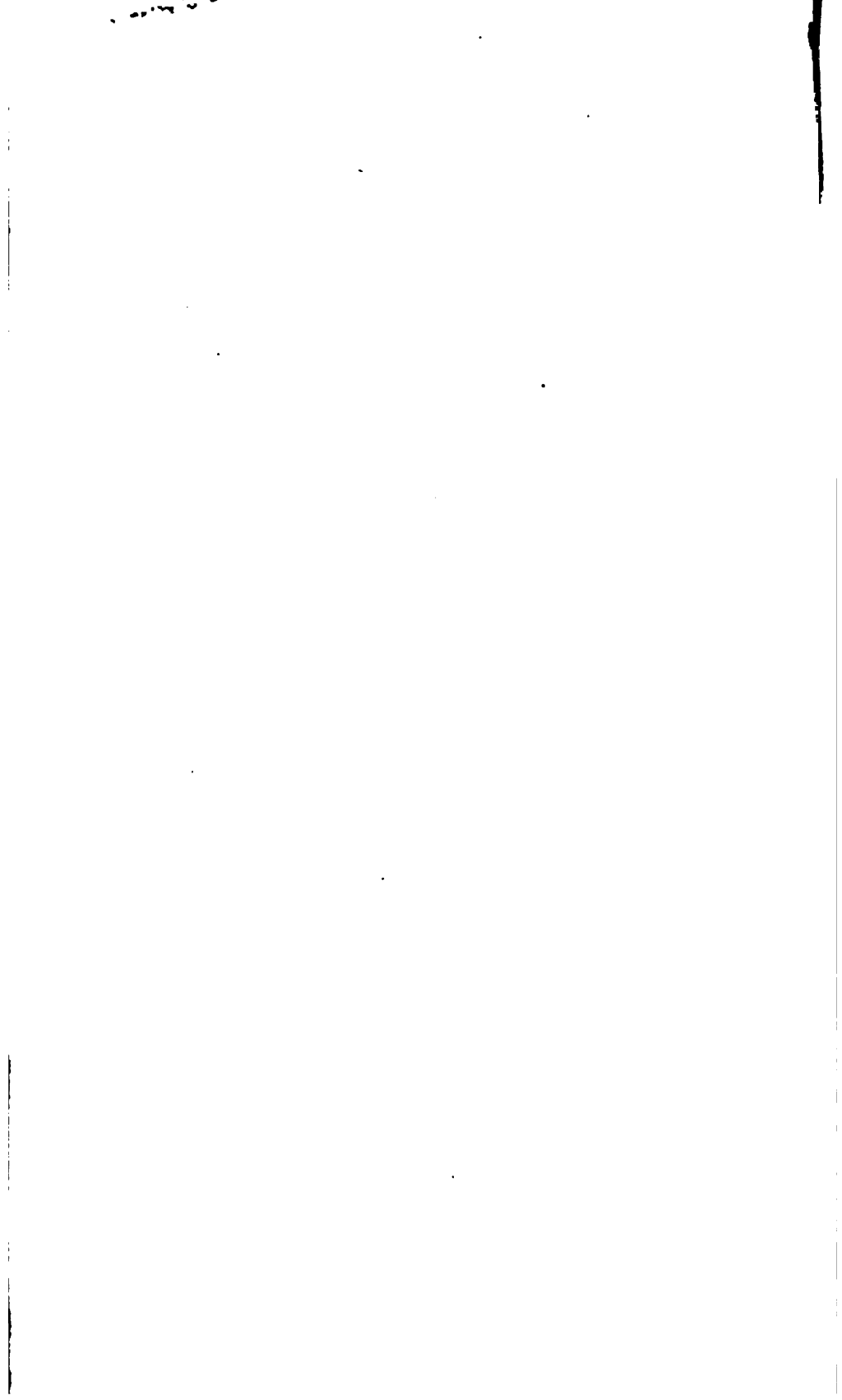
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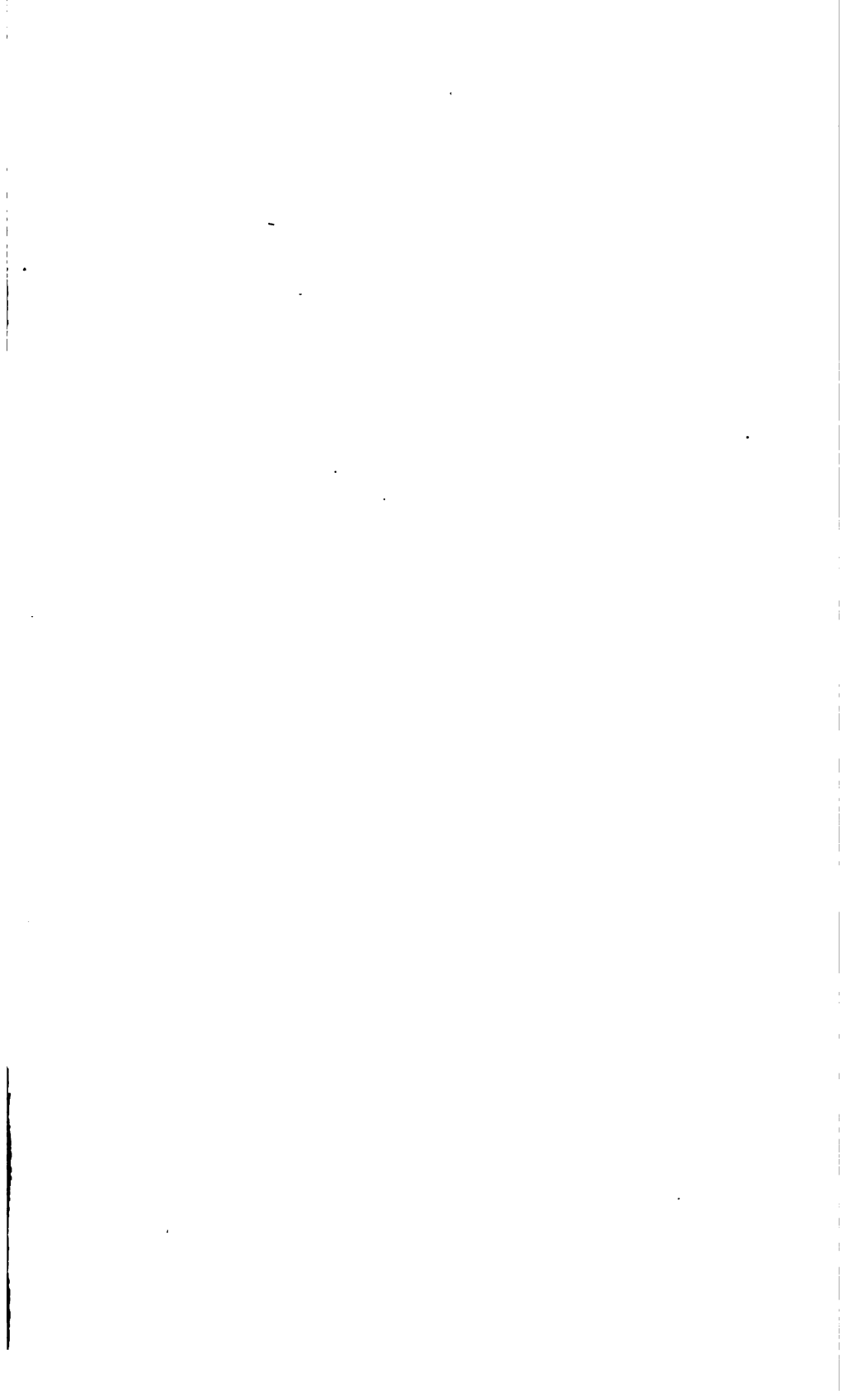
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R E P O R T S

O F

C A S E S

ARGUED AND ADJUDGED IN THE

Courts of King's Bench, Common Pleas, and Exchequer.

TO WHICH ARE ADDED,

Some SPECIAL CASES in the COURT of CHANCERY ;
And before the DELEGATES.

By the Right Hon. Sir *JOHN COMYNS*, Knt.
Late Lord Chief Baron of his Majesty's Court of Exchequer.

With TABLES of the CASES, and of the PRINCIPAL MATTERS.
The SECOND EDITION, Corrected ;
With MARGINAL NOTES and REFERENCES to former and later Reports,
and other Books of Authority ;

By SAMUEL ROSE, of *Lincoln's-Inn*, Esq.

IN TWO VOLUMES.

VOL. I.

L O N D O N :

PRINTED BY A. STRAHAN AND W. WOODFALL,
LAW-PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY,
FOR WHIELDON AND BUTTERWORTH, IN FLEET-STREET.

1792.

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TO THE RIGHT HONOURABLE
EDWARD LORD THURLOW,
BARON THURLOW OF ASHFIELD,
IN THE COUNTY OF SUFFOLK.

MY LORD,

IN dedicating this Work to your Lordship, it is not my Intention to obtrude upon you those Praises, which are usually contained in Addresses of this Nature. Yet I have long been ambitious of declaring to the World the high Respect in which I hold both the Character of your Lordship, and that of my Author.

It was in order to gratify this Ambition, that I ventured to solicit the Honour of placing

VOL. I.

A 2

your

D E D I C A T I O N.

your Name, my Lord, at the Head of these Volumes. Such a Purpose, indeed, could be accomplished by no Means so effectually, as by inscribing the Performance of a Writer eminent for legal Abilities, to your Lordship, whose superior Talents, exerted in the same Profession, have deservedly ranked you among its most distinguished Ornaments.

I have the Honour of being,

With profound Respect,

MY LORD,

Your Lordship's obliged

And obedient Servant,

SAMUEL ROSE,

T H E

EDITOR'S PREFACE.

THIS Work of Chief Baron *Comyns* is a posthumous Publication, and is, therefore, less complete, than it would have been, if it had received the Corrections of the learned and ingenious Author. The Liberty has been taken, on this Account, of altering the Text in those Instances, in which it was found unintelligible or obscure. Where Sir *John Comyns* has referred to a Book *generally*, which is an usual Practice with him, the particular Passages to which it was supposed that he must allude, have, with two or three Exceptions, been ascertained : a Measure which will save the Reader as much Trouble, as it has imposed upon the Editor.

The Marginal Abstracts were, for the most part, very insufficient, and were calculated rather to mislead, than to inform those who imagined that they deserved any Confidence. All of this Description have been expunged, and others which did not appear chargeable with the same Inconvenience, have been substituted.

The Table of the principal Matters in the original Edition, was so imperfect, that it appeared indispensably necessary to supply one

THE EDITOR'S PREFACE.

which was fuller and more comprehensive. This Part of the Work, the Editor flatters himself, will be found useful in proportion to the Labour with which it has been attended.

Care has been always taken to point out where the same Case has been reported by contemporary Writers; and, where this Circumstance is omitted by the Author, the Notes have universally shewn in what Manner it has eventually been disposed of. Where the Law upon any Subject treated in the following Pages, has been controverted by later Decisions, or overturned by subsequent Statutes, the Editor has, in those Instances to which his Knowledge extended, mentioned the Alterations which have taken place.

Thus has he, in a particular Manner, made himself responsible for what is contained in the Margin, and in the Notes; and if, on any Occasion, they serve to illustrate and explain what would otherwise have remained intricate and perplexed, he will feel himself sufficiently rewarded for any Difficulty which he may have encountered in this Undertaking.

DEDICATION
TO THE
FIRST EDITION.

TO THE RIGHT HONOURABLE
Sir WILLIAM LEE, Knt.
LORD CHIEF JUSTICE OF ENGLAND.

MY LORD,

WHEN the Demands of the Profession made it in a Manner necessary that these REPORTS should from the Obscurity of a private Study be introduced to the Public, whatever Difficulties might arise in the Compliance, there surely could be no Room for a Moment's Hesitation to determine whose Patronage and Protection they should claim; having I well hoped (and your Lordship's Indulgence since, has confirmed me in that Sentiment) a double Title to your Lordship's, not only as one, for whom the Author in private Life was ever used to profess the highest personal Honour and Regard, but as the supreme Magistrate of the Common Law, presiding with so

DEDICATION TO

great Reputation in that Court where they date their Beginning.

The Difficulty of succeeding a Person so truly eminent as your Lordship's noble and learned Predecessor, was too apparent to all the World ; but I may venture with as much Truth to add, that his Majesty (whose great Regard and paternal Affection for his Subjects, can appear in nothing more than so worthily filling the Seats of Justice) never gratified them in a more sensible Manner, than when he conferred that Honour on your Lordship ; for however excellent great Abilities, and profound Science are in themselves, however necessary to Persons intrusted with the publick Sword of Justice, they only become truly valuable to the rest of Mankind, when governed and directed by the Rules of Honour, Virtue and Integrity. Thus regulated, My LORD, we are sure they will be made subservient to no bad Purposes ; it is then, they are quick to detect, but at the same Time can for no sinister Views be induced to palliate a Falsehood ; and this, give me leave to add, is the Security, this the Satisfaction the People of *England* at present enjoy under your Lordship's wise and worthy Administration ; but I beg Pardon, for I fear this is an Instance, (tho' I am sure it is the only one) where your Lordship would desire the Truth should be suppress'd ; nor must I forget, that whilst I am gratifying myself, I not only *Infirmo sermone detero*, but run
the

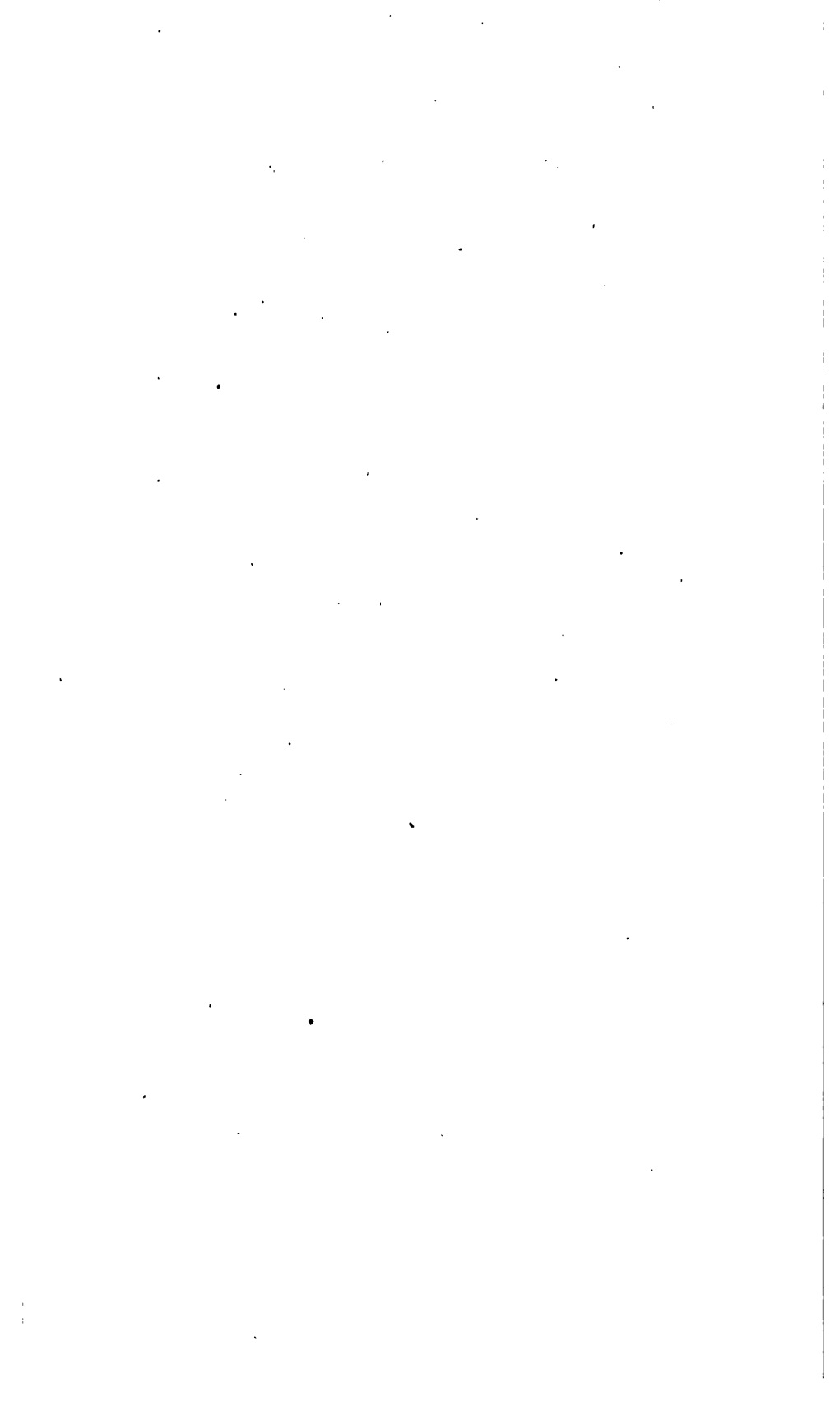
the Risque likewise of offending that known Characteristick of your Lordship's, so justly compared by the ingenious Mr. *Addison* to the Shades in fine Colourings, which gives them all their due Lustre, their several and peculiar Advantages.

Give me leave therefore, My LORD, only to add, that as I rely upon your known Candour to excuse the Trespass, I could not omit this Opportunity of testifying my profound Respect for your Lordship, and subscribing myself,

Your Lordship's

Most obedient, and
devoted humble Servant,

J. COMYNS.



P R E F A C E

TO THE

F I R S T E D I T I O N.

THE Reader will observe, that some of the Cases, particularly those adjudged in the Court of King's Bench, and contained in the first Part of this Work, are already to be found in some late Reports, (1) which put me at first in great Doubt, whether it would be so expedient to publish them again; but upon consulting with my Friends of the first Eminence in the Law, I was advised that it was no Objection, where they did not appear to be in a Manner verbatim, and even then, in very solemn Cases or Determinations, they would not be without their Use; for as in the first of these Instances, the Manner of reporting the same Case by different Hands frequently throws a Light upon the Subject which would otherwise in some Parts remain dark and obscure; so in the last of them it is a concurrent Testimony, and (as such) must add Weight to the Authority; however (notwithstanding these Motives to the contrary) it is certainly true, that many Cases

(1) The Reporters to whom Mr. Comyns alludes, are Serjeants Salkeld and Cartbrow, Comberbach and Lord Raymond.

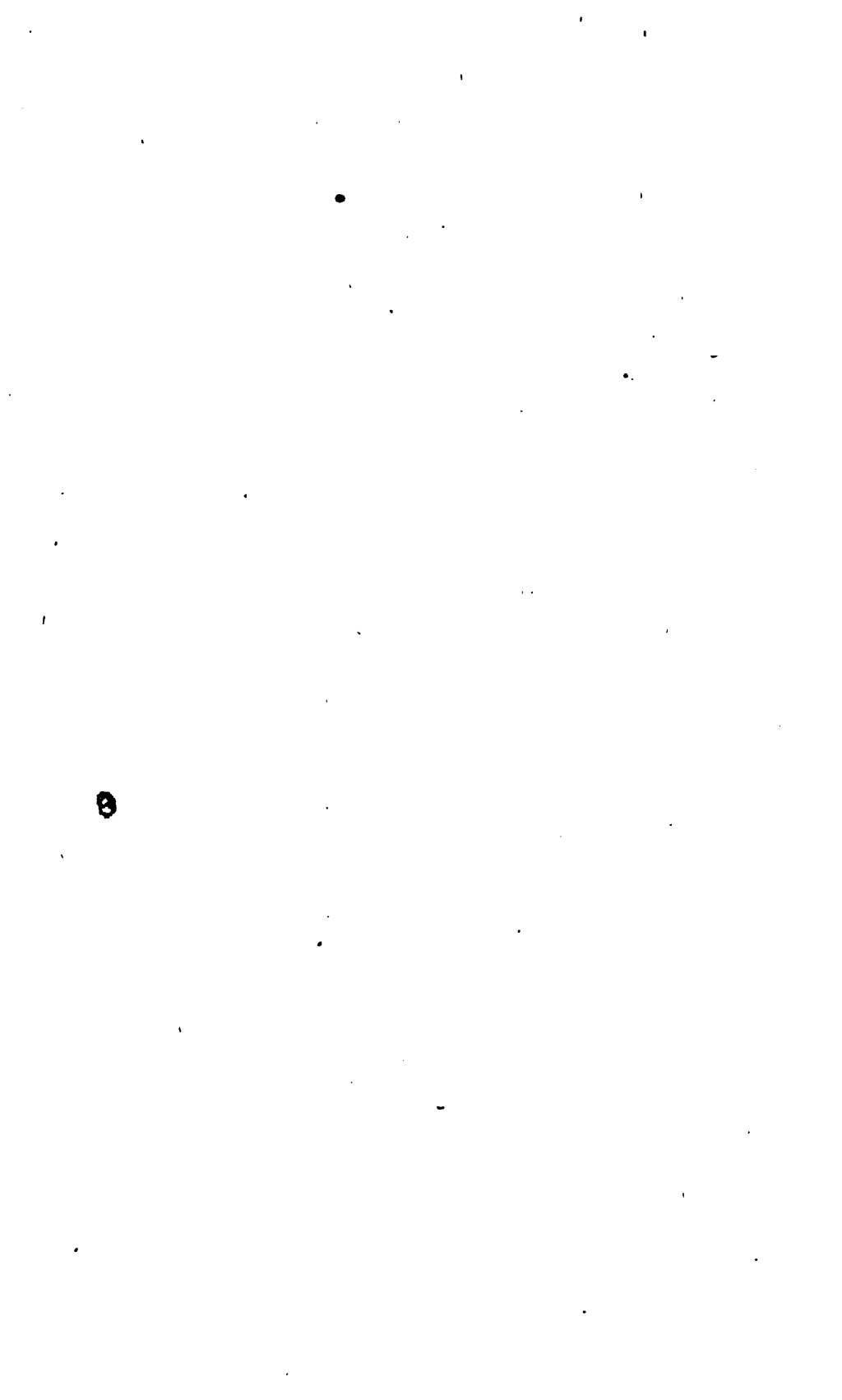
are omitted either where the Subject was thought too trite, or where the same Case has been reported in two or three Cotemporary Authors very near in hæc verba : So likewise it has been a Rule in general to strike out those Cases where the Judgment of the Court does not appear ; not but that I have thought myself obliged to deviate from this likewise in some few Instances, where the Points have been either extremely well argued at the Bar, or so far broke by the Bench, that their Opinion might be clearly collected, and nothing farther ever done in the Cause.

Reports (though it must be acknowledged already too voluminous) seem of all other Law Performances the most acceptable to the Profession, and therefore this Volume has been pressed into Service : The Cases in the Common Pleas and Exchequer being very much desired.

Defects and Imperfections must be expected in all human Performances, and as the greatest Part of the Original of this work was in Law French, it is possible that may in some Degree contribute to them, though I am the more unwilling to surmise or suspect this, as I have been assisted in the Translation, &c. by Gentlemen of known Learning and Abilities in the Profession, whose Service I cannot omit this
Opportunity

Opportunity of acknowledging. However, sure I am that the Author (had he been living) would have sent them forth to a better Advantage; for though a Report in the Nature of it, may be thought a Work as little likely to suffer from a Translation as any other, yet as there are certain technical Terms and Idioms peculiar to every Language and Science, which appear best in their native Dress, so likewise are there some particular Expressions in the Original, which though the Author himself might have thought proper to alter, I fear the Editor could not be justified in doing it. If upon the whole any Thing in them contributes to the public Advantage and Emolument, the Honour is due to his Memory, and I shall rejoice; whatever on the contrary appears in them either incorrect or imperfect, I hope the Reader will candidly impute to the Misfortune the Public had in losing him before they went to the Press.

J. C.



A

T A B L E

O F T H E

Names of the Cases Reported,

Alphabetically disposed, in such a double Order, as that the Cases may be found by the Names either of the Plaintiffs or of the Defendants.

N. B. Where *versus* follows the first Name, it is that of the Plaintiff; where *and*, it is the Name of the Defendant.

A.				Page
A BBOT <i>versus</i> Burton	160	Ashmead <i>v.</i> Ranger		71
Abrahah <i>v.</i> Bunn	250	Alton <i>and</i> Harvy		726
Acherly <i>v.</i> Vernon	381. 513	Athelston <i>v.</i> Moon and Ano-		
Ackland <i>and</i> Hopewell	164	ther		547
Acton <i>and</i> Gage	67	Athol's Case		158
Adlam <i>and</i> Matruvas	573	Atkinson <i>and</i> Hodgson		603
Aidee <i>and</i> Uphare	25	Atkyns <i>and</i> East India Com-		
Alberry <i>and</i> Scott	337	pany		347
Allen <i>and</i> Steward	235.	Attorney General <i>v.</i> Perry		481
Almanzor <i>v.</i> Davilack	94	_____ <i>v.</i> White		433
Angus <i>and</i> Trevet	568	_____ <i>v.</i> Young		423
Anonymous 25. 31. 43. 49. 74.		Aufin <i>v.</i> Osborn		243
147. 148. 150. 228. 248. 262.				
273. 345. 580. 615.				
Appleby <i>and</i> Pickering	354	B.		
Armstrong <i>and</i> Cockerel	582	Badge <i>v.</i> Floyd		62
Arriskin <i>and</i> Thomson	328	Bailey <i>and</i> Castle		528
		Bailey <i>v.</i> Cheesely		114
		Bailey		

Bailey and Shelf	Page 183	Brooks and Bishop	Page 303
Bangor (Bishop of) and Wynn	601	Brotherow v. Hood	725
Bank of England v. Newman	57	Buckingham and Smalcomb	35
Bardwell and Fox	498	Bull and Powell	265
Barker v. Lamplugh	142	Bunn and Abrahath	250
Barker & Ux', v. Palmer	141	Burnaby and The Queen	131
Barnard and Coggs	133	Burton and Abbot	160
Barnes v. Otway	420	Burton and Bishop	614
Barton v. Fuller	18	Burwell and Groenvelt	76
Bayley v. Warburton and Another	494	Bury (Aldermen and Burgeffes of) v. Evans	643
Bearbank and Goodwin	53	Bury (Steward of) v. Rabutin	566
Bennett v. Thalbois	26		
Bentfield and Bokenham	392	C.	
Berry and Parry	269	Cardonell and Culliford	1
Beffingham and Landon	156	Carew and Loyd	20
Bettison v. Savage	335	Cartlitch v. Eyles	558
Bingloe and Matlem	570	Castle v. Bailey	528
Birch and Dummer	146	Chalbury and The King	71
Bird v. Line	190	Chambers v. Gambier	554
Bird and Spincks	564	Chambers v. Shaw	206
Birt and Stroud	7	Chaplin and Southgate	230
Bishop v. Brooks	303	Chapman and Rudge	697
—— v. Burton	614	Cheefely and Bailey	114
Blackall v. Heal and Another	12	Chesterfield (Earl of) v. Bolton (Duke of)	627
Blackborough v. Davis	96. 108	Child and Bodmyn (Viscountess of)	185
Blacklock v. Mariner	557	Clanrickard (Earl of) v. Bourk and Another	237
Blackwell and Fowler	353	Clark and The King	388
Bluet v. Needs	522	Clarke v. Smith	72
Blunt and Another v. Hawkins	446	Clendon and Huxley	554
Bodingham and Jones	8	Clerk and The King	24
Bodmyn (Viscountess of) v. Child	185	Clerk and Machel	119
Bokenham v. Bentfield	392	Clubb and Hughs	369
Bolton (Duke of) and Chesterfield (Earl of)	627	Cockerel v. Armstrong and Another	582
Bourk and Clanrickard (Earl of)	237	Coggs v. Barnard	133
Bourne and Hunt	93	Cole and Britton	51
Bradburne and Goodtitle	564	Collins and Newland	302
Brice v. Smith	539	Collins	
Britton v. Cole	51		

<i>Collins and White</i>	Page 289
<i>Coles and Hunt</i>	226
<i>Cook v. Cook</i>	712
<i>Corneford and Richards</i>	42
<i>Cornish v. Trefey and Another</i>	541
<i>Cotton and Lane</i>	100
<i>Coventry (Earl of) v. Lady Coventry</i>	312
<i>Coward and Dean</i>	386
<i>Cragg and Fitzgerald</i>	139
<i>Craven v. Hanley</i>	548
<i>Cripps and Parflow</i>	204
<i>Croft v. Powell and Another</i>	603
<i>Crofs and Osbaldiston</i>	612
<i>Cudworth and Feltham</i>	112
<i>Culliford v. Cardonel</i>	1

D.

<i>Davies and Mills</i>	590
<i>Davilack and Almanzor</i>	94
<i>Davis and Blackborough</i>	96. 108
<i>Daw v. Newborough</i>	242
<i>Day v. Snelgrove</i>	74
<i>Dean v. Coward</i>	386
<i>Denham and Salmon</i>	323
<i>Depaba v. Ludlow</i>	360
<i>Dighton v. Tomlinson</i>	194
<i>Dorn v. Gashford</i>	44
<i>Downes and Hall</i>	309
<i>Drew and Walter</i>	372
<i>Dummer v. Birch</i>	146
<i>Durham (Bishop of) and The King</i>	361

E.

<i>East India Company v. Atkins</i>	347
<i>—— and Naish</i>	462

VOL. I.

<i>Edmonton (Hundred of) and Tashmaker</i>	Page 345
<i>Edmund v. Shaler</i>	159
<i>Eller and The King</i>	109
<i>Ellerton & Ux' v. Gastrell</i>	318
<i>Erifey and West</i>	412
<i>Evans and Bury (Corporation of)</i>	643
<i>Evans v. Lady Fauconberg</i>	391
<i>Evans and Ward</i>	138
<i>Ewer and Gale</i>	22
<i>Ewer v. Jones</i>	137
<i>Eyles and Cartlitch</i>	558

F.

<i>Falkland (Viscount) v. Phipps</i>	439
<i>Fauconberg (Viscountess of) and Evans</i>	391
<i>Fawcett v. Strickland and Another</i>	578
<i>Feltham v. Cudworth</i>	112
<i>Fenns (Governors of) v. Hare</i>	694
<i>Field v. Workhouse</i>	264
<i>Fisher v. Wigg</i>	88. 92
<i>Fitzgerald v. Cragg</i>	139
<i>Fitzherbert v. Reeves</i>	169. 181
<i>Fleetwood and Thornby</i>	207
<i>Fletcher and Makepiece</i>	457
<i>Floyd and Badge</i>	62
<i>Fothergil and Hungate</i>	613
<i>Fowler v. Blackwell and Another</i>	353
<i>—— and Philips</i>	525
<i>Fox v. Bardwell and Another</i>	498
<i>Foy and Hutchins</i>	716
<i>Frances and The King</i>	478
<i>Freke v. Thomas</i>	110
<i>Fry and Lately</i>	19
<i>Fuller and Barton</i>	18

a

Fuller

Fuller and Pardo	Page 579	Hare and Fenns (Governors	
Fullwood and Wall	330	of the)	Page 694
Fyson v. —	205	Harman v. Ouden	89
		Harris and The King	61. 547
G.		Harrison v. Hart and Ano-	
		ther	393
Gage v. Acton	67	— v. Ridley and Ano-	
Gale v. Ewer	22	ther	589
Gally v. Selby	343	Hart and Harrison	393
Gambier and Chambers	206	Harvy v. Aston	726
— v. Larkin	553	— v. Richardson	161
Gashford and Dorn	44	— v. Stokes	566
Gastrell and Ellerton	318	Hallewood and Howes	555
Gifford and Huddy	321	Hastings and Heylin	54
Gill and Parsons	117	Hawkins and Blunt	446
Goddard and Poulton	142	Hay and Stedman	366
Goodtitle v. Bradburne and		Heal and Blackall	12
Another	564	Hedgethorne v. Thurlock	305
Goodwin v. Bearbank	53	Hereford (Bishop of) and The	
Gordon and Grant	583	King	358
Grant v. Gordon	ibid	Heylin v. Hastings	54
Gravefend (Inhabitants of)		Higginson v. Sheif	153
and The King	97	Hill and Hammond	180
Gree v. Rolls	113	Hilliard v. Jennings	90. 94
Gregory v. Walcup	75	Hodgson v. Atkinson	603
Green & Ux' v. Roe	581	Hole v. King	162
— and Warner	114	Holyday and Walker	272
Gripe and The King	43	Hood and Brotherow	725
Groenvelt v. Burwell and Others	76	Hook and Skip	563
		Hopewell v. Ackland	164
H.		Horsenail and Moxon	534
		Howes v. Hallewood	555
Haines v. Jeffreys	2	Hubburb and Yalden	231
Hale v. Owen	132	Huddy & Ux' v. Gifford	321
Hall v. Downes	309	Huggins and The King	422
Hammond v. Hill	180	Hughes v. Club and Another	369
— and Right	232	Hungate v. Fothergil	613
Hands v. James	531	Hunt v. Bourne	93. 124
Hanley and Craven	548	Hunt v. Coles and Another	226
Harding v. Harding	148	Hussey v. Hussey and Another	260
— and Keld	378	Hussey v. Jacob	4
		Hutchins	

Hutchins v. Foy and Another	Page 716
Huxley v. Clendon	554

I.

Jacob and Huffey	4
James and Hands	531
—— v. Matthews	157
Jarrett and Lutham	236
Jeffreys and Haines	2
Jennings and Hilliard	90. 94
—— and Nottingham	82
Jersey (Countess of) and St. Amand	255
Ilford and Stonehouse	145
Johnson v. Lee	18
Jones v. Bodingham	8
—— and Ewer	137
—— v. Meredith and Another	661
—— v. Mosely	29. 47
Iveson v. Moor	58
Juxon & Ux' v. Naylor	60

K.

Keate and The King	13
Keck and Parker	84
Keld and Another v. Harding	378
Kellingworth and Lancashire	116
Kennet Lord Duffus (Case of)	440
King and Hole	162
—— and May	116
The King v. Chalbury (Inhabitants of)	71
—— v. Clark	388
—— v. Clerk	24
—— v. Durham (Bishop of) and Others	361
—— v. Eller	109
—— v. Frances and Others	478

The King v. Gravesend (Inhabitants of)	Page 97
--	---------

—— v. Gripe	43
—— v. Harris	61. 547
—— v. Hereford (Bishop of) and Others	358
—— v. Huggins	422
—— v. Keate	13
—— v. Manning	616
—— v. Osborn	240
—— v. Pond	312
—— v. Rippon (Corporation of)	86
—— v. Thorp and Others	27
—— v. Tyler	109
The King v. the Inhabitants of ———	86
The King v. ———	86

L.

Lamplugh and Barker	142
—— v. Shortridge	115
Lancashire v. Kellingworth	116
Landon v. Bessingham	156
Lane v. Cotton and Another	100
Larkin and Gambier	553
Lately v. Fry	19
Layton and Rock	87
Leach and Thompson	45
Leaver v. Witcher	561
Lee and Johnson	18
Le Marque v. Newman	551
Lester and Walker	376
Levin v. ———	118
Lilly and Noxon	537
Limbery v. Mason and Another	451
Line and Bird	190
Lisle and Reason	576

A Table of the Names of the Cases.

Loveday v. Mitchell	Page 247	Mosely and Jones	Page 29. 47
—— and Winter	37	Moxon v. Horsenail and Ano-	
Loyd v. Carew and Another	20	ther	534
Ludlow and Depaba	360	Mudge v. Mudge	333
Lutham v. Jarrett	236		
		N.	
M.		Naish v. East India Company	462
Machel v. Clerk	119	Naylor and Juxon	60
Mackenzie v. Powis (Mar-		Needs and Bluet	522
quis of)	675	Newberry & Ux' v. Strad-	
Makepiece v. Fletcher and		wick	533
Another	457	Newborough and Daw	242
Manning and The King	616	Newland v. Collins	302
—— and More	311	Newman and Bank of England	57
Mariner and Blacklock	557	—— and Le Marque	551
Marriott v. Shaw and Ano-		Nottingham v. Jennings	82
ther	274	Noxon v. Lilly and Another	537
Martin and Speed	587		
Mafon and Limbrey	451	O.	
—— and Rushworth	448	Osbaldfiston v. Cross and Ano-	
Matlem v. Binglee and Ano-		ther	612
ther	570	Osborn and Austin	243
Matras v. Adlam and Ano-		—— and The King	240
ther	573	Otway and Barnes	420
Matthews and James	157	Ouden and Harman	89
May v. King	116	Ougly and Peate	197
Mead and Robinson	371	Owen and Hale	132
Meredith and Jones	661	Owens v. Smith	715
Meyrick and Skirme	700	Oxford (University of) and	
Milles v. Davies and Ano-		Fitzherbert	169. 181
ther	590		
Mitchell and Loveday	247	P.	
Moody and Sutton	34	Pain and Wallis	633
Moone and Athelston	547	Palmer and Barker	141
Moor and Iveson	58	—— v. Stavelly	115
Moravia v. Sloper and Ano-		Pardo v. Fuller	579
ther	574	Parker v. Keck	84
More v. Manning	311	Parry v. Berry	269
More and Roe	597	Parlow v. Cripps	204
More v. —	307		

Parsons v. Gill	Page 117	Reeves and Fitzherbert	Page 169
Pattison and Richardson	555	—— v. Trindle	257
Peate v. Ougly	197	Rhodes and Scrape	542
Pelling v. Whiston	199	Richards v. Cornesford	42
Penrice and Piggott	250	Richardson and Harvey	161
Perry and The Attorney General	481	—— v. Pattison	555
Petit v. Smith	3	—— and Smith	552
Pett v. Pett	87	Rider and Wagstaff	341
Philips v. Fowler	525	Ridley and Harrison	589
—— v. Smith	279	Right v. Hammond and Another	232
Phipps and Falkland	439	Rippon (Corporation of) and The King	86
Pickering v. Appleby	354	Roberts and Prideaux	251
Piggott v. Penrice & Ux'	250	Robinson v. Mead	371
Pinfold and Upton	267	Rock v. Layton	87
Piper v. Thompson	418	Roe and Green	581
Pitt's Case	444	—— v. More	597
Pond and The King	312	Rogers v. Wilson	365
Poulton v. Goddard	142	Rolls and Gree	113
Powell v. Bull and Another	265	Royston and Redding	123
—— and Croft	603	Rudge v. Chapman and Another	697
Powis (Marquis of) and Mackenzie	675	Rushworth v. Mason and Another	448
Presgrave v. ——	75	S.	
Prideaux v. Roberts	251	Salmon v. Denham and Another	323
Priestley and Walker	376	Saunders v. Stevens	270
Q.		Savage and Bettison	335
The Queen v. Burnaby	131	Schawrtz and Scott	677
R.		Scott v. Alberry	337
Rabutin and Bury (Steward of)	566	—— v. Schawrtz	677
Ram v. Thacker	50	Scrape v. Rhodes and Another	542
Ranger and Ashmead	71	Selby and Gally	343
Reason v. Lisle	575	Shaler and Edmund	159
Redding v. Royston	123	Shaw and Chambers	206

Shaw and Marriott	Page 274
Sheif and Higginson	153
Shelf v. Baily	183
Shelley v. Wright	562
Shortridge and Lamplugh	115
Skip v. Hook	563
Skirme v. Meyrick and Another	700
Sloper and Moravia	574
Smalcomb v. Buckingham and Another	35
Smith and Brice	539
— and Clarke	72
— and Owens	715
— and Petit	3
— and Philips	279
— v. Richardson	552
— v. Walgrave	122
Snelgrove and Day	74
Southgate v. Chaplin	230
Speed & Ux' v. Martin	587
Spinks v. Bird	564
St. Amand v. Jerfey (Coun- tels of)	255
Stamp and Turberville	32
Stavely and Palmer	115
Stedman v. Hay	366
Sterling v. Tanner	115
Stevens and Saunders	270
Steward & Ux' v. Allen & Ux'	235
Stokes and Harvey	566
Stonehouse v. Ilford	145
Stradwick v. Newberry	533
Strickland and Fawcett	578
Stroud v. Birt	7
Sutton v. Moody	34

T.

Tanner and Stirling	Page 115
Tashmaker v. Edmonton (Hun- dred of)	345
Thalbois and Bennett	26
Thomas and Freke	110
Thomlinson v. Arriskin	328
Thompson v. Leach	45
— and Piper	418
Thornby v. Fleetwood	207
Thorp and The King	27
Thorpe v. Thorpe	98
Thurlock and Hedgethorn	305
Tomlinson and Dighton	194
Trefey and Cornish	541
Trevet v. Angus	568
Trindle and Reeves	257
Truelock v. —	17
Turberville v. Stamp	32
Tyler and The King	109

V.

Vaifey v. Whiston (Hun- dred of)	327
Vernon and Acherley	381. 513

U.

Upshare v. Aidee	25
Upton v. Pinfold & Ux'	267

W.

Wagstaff v. Rider and Ano- ther	341
Walcup and Gregory	75
Walgrave and Smith	122
Walker v. Holyday	272
— v. Lester	376
— v. Priestley	ibid.
Wall	

A Table of the Names of the Cases.

xxiii

Wall v. Fulwood and Another		White v. Collins	Page 289
	Page 330	Wigg and Fisher	88. 92
Wallis v. Pain and Another	633	Wilson and Rogers	365
Walter v. Drew and Another	372	Winter v. Loveday	37
Warburton and Bayley	494	Witcher and Leaver	561
Ward v. Evans	138	Workhouse and Field	264
Warner v. Green	114	Wright and Shelley	562
Wayman v. Wayman	556	Wynn v. Bangor (Bishop of)	601
West v. Erisley and Another	412		
Whifton and Pelling	199	Y.	
Whifton (Hundred of) and			
Vaifev	327	Yalden v. Hubburb	231
White and The Attorney Ge-		Young and The Attorney Ge-	
neral	433	neral	23

A

T A B L E

O F

The Names of the Cases

Cited in the Text of this Work, Alphabetically disposed in such a double Order, as that the Cases may be found by the Names either of the Plaintiffs or of the Defendants.

N. B. Where *Versus* follows the first Name, it is that of the Plaintiff, where *And*, it is the Name of the Defendant.

A.		—— and Cooper	Page 286
		—— and Martingdale	59
A	Bingdon and Prowse	Anger v. Brogan	336
	720. 724	Antrim v. Buckingham (Duke	
		of)	315. 496
	Aclon <i>versus</i> Pierce	Archer's Case	301
	Adams v. Albion	Archer and Pool	631
	Adney v. Vernon	Aris v. Stukely	491
	Aland and Wyat	Armstrong v. Lisle	260
	Albon and Adams	Arnold v. Bidgood	661
	Alexander v. Lane	Ashfield v. Wrenford	567
	Allein v. Randal	Ashley v. Freckleton	368
	Allen and Compton	Aston v. Aston	755
	—— and Hearn	Athol v. Derby	444. 445
	—— and Jacob	Atkins and Badcock	529
	Alton-Wood's Case	—— and Bargrave	330
	Andrews and Blandford	—— and Bowles	648. 656
	—— and Bray		Atkinson

<i>Beddingfield and Day</i>	<i>Page</i> 367	<i>Bond and Cheevely</i>	<i>Page</i> 710
—— <i>v.</i> Feake	638	<i>Bonithan and Woodward</i>	75
<i>Bedford's Case</i>	217	<i>Bonham's Case</i>	61. 80
<i>Bedford v. Ovington</i>	116	<i>Booth v. Nortrop</i>	554
<i>Bejushim and Colthirst</i>	516	<i>Boothby v. Bailey</i>	367
<i>Bellasis v. Ermine,</i>	729. 730	<i>Boscaw and Groffe</i>	593
<i>Belfon and Baynes</i>	315	<i>Bosinger and Cooke</i>	355
<i>Beners, (Hundred of) and</i>		<i>Bould and Walter</i>	548
<i>Walford</i>	285	<i>Bowen and Smith</i>	149. 260
<i>Benhurft (Hund. of) and Helier</i>	536	<i>Bowler and Richard</i>	575
<i>Bennett v. Filkins</i>	247	<i>Bowles v. Atkins</i>	648. 656
<i>Bennett and Tomkins</i>	485	<i>Bowman v. Milbank</i>	168
<i>Bensley and Strike</i>	305	<i>Boyton's Case</i>	553
<i>Benson and Olive</i>	647. 652	<i>Brace and Lee</i>	459. 460
<i>Benton v. Trot</i>	661	<i>Bradbury v. Burch</i>	368
<i>Bermingham and Winter</i>	667	<i>Bradish and Gunnell</i>	282
<i>Bernard and Coggs</i>	406	<i>Bradley (Hund. of) and</i>	
<i>Bertie v. Falkland</i>	516. 731. 745.	<i>Coombes</i>	627
	746	<i>Beadshaw and Hanour</i>	320
<i>Bessy and Oliet</i>	115	<i>Braithwaite and Lamplugh</i>	117
<i>Best and Wheatley</i>	188. 581	<i>Bray v. Andrews</i>	268
<i>Beverley v. Cornwall</i>	179. 180	—— <i>v.</i> Partridge	191
<i>Biddulph and Drake</i>	387	<i>Brayne and Watts</i>	259, 260. 526
<i>Bidgood and Arnold</i>	661	<i>Brereton v. Evans</i>	391
<i>Biggott v. Smith</i>	46	<i>Brian and Cadwalader</i>	202
—— <i>and Lomax</i>	663	—— <i>v.</i> Cawfen	540
<i>Birt and Hallett</i>	594. 595	<i>Brickhead v. Archbishop of</i>	
<i>Bilby and Michel</i>	278	<i>York</i>	360
<i>Bisse v. Harcourt</i>	189	<i>Bridgwater v. Bolton</i>	338, 339
<i>Blackman and Baker</i>	302. 303	<i>Briggs and Riches</i>	136
<i>Blackmore's Case</i>	149. 285	<i>Briggs and Moreton</i>	311
<i>Blackstone and Lavender</i>	696	<i>Britton v. Charnock</i>	73
<i>Blake and Vanderbergh</i>	191	—— <i>v.</i> Wade	508
<i>Blanford v. Andrews</i>	117	—— <i>and Ward</i>	638
<i>Bletfoe and Carter</i>	717. 719. 723	<i>Brittridge and Stephens</i>	565
<i>Bligh v. Lord Darnley</i>	713	<i>Broad v. Joliffe</i>	269
<i>Blockley v. Slater</i>	8. 44	<i>Broadhead v. Lewis</i>	661
<i>Blodwell and Sands</i>	710	<i>Brogan and Anger</i>	336
<i>Bobbett and Baynton</i>	392	<i>Brook v. Hall</i>	635
<i>Bolton and Bridgewater</i>	338, 339	—— <i>v.</i> Mountague	552
		<i>Brown and Banks</i>	317
		<i>Brown</i>	

Brown v. Heath	Page 453	Canterbury's (Archbishop of)	
— v. Lane	530	Cafe	Page 168. 340
— v. Lothar	311	Capell and Dean and Cap. St.	
— and Pelles	325	Paul	322
Brown v. Bruen	719	Carbeld and The Attorney Ge-	
	720. 723. 742	neral	618. 621. 623
Bucher v. Shirley	285	Carew v. Merler	283
Buck v. Frenchman	428	Carew's Cafe	219
Buckle and Reynolds	11	Carpenter and Halfey	162
Buckler's Cafe	128	Carter v. Bletfoe	717. 719. 723
Buckley v. Guildbank	586	— v. Crawley	87.
Buckingham (Duke of) and		— and Kind	305
Lord Antrim	315. 496	Cartwright and Rand	669
Bud and Perrin	191	Cary v. Webster	486. 489
Bulwer and Marsham	283	Cafe v. Stephens	536
Burch and Bradbury	368	Cave v. Cave	722. 737. 752
Burditt v. Pix	146	Cawfen and Brian	540
Burges and The Attorney		Chadwell and Aylefworth	282
General	618. 620. 622	Chamberlain and Harvey	268. 529
Burkitt v. Burkitt	456	— v. Hobbs	436
Burrowes v. Usher	529	Chambers and Mafon	39
Burwell and Harrifon	319	— v. Moor	285
Busnell's Cafe	81	— v. Taylor	5
Butcher v. Porter	592	— and Wilfon	141. 355
Butlar and Doe	617. 620. 622	— v. Workhouse	355
Butler v. Baker	78. 453	Chancellor's (Lord) Cafe	176
Button v. Long	661	Chandler v. Grills	282
Butts v. Penny	355	Chantflower v. Prestley	147
Buxon v. Hoskins	418	Chapman v. Flexman	8
Buxton v. Bateman	368	Charnock and Britton	73
Byard's Cafe	15	Chafe v. Wave	23
		Checevely v. Bond	710
C.		Cholmley's Cafe	66
Cadwalader v. Brian	202	Cheney and Clerke	59
Calver and The Attorney Ge-		Cheyne's Cafe	408
neral	622	Child v. Sloper	283
Calvin's Cafe	692	Christchurch College v. Wed-	
Calye's Cafe	101	drington	589
Cambling v. Tendling (Hund-		Chudleigh's Cafe	669
red of)	284	Cheele and Stapleton	722. 737.
			752
			Clache's

A Table of the Names of the Cases.

xxix

Clache's Case	Page 544	Cooke v. Bofinger	Page 355
Claridge and Loveday	452	— and Hodgson	190. 575
Clark v. Day	291	Cooper v. Andrews	286
— v. Thomson	69	Cooper and Bishop of Lincoln	654
— and Van	718. 720. 724	— and Doe	436
Clarke v. Istead	574	— v. Edgar	517
Clave and Atkyns	379	— and Stanford	548
Claxton v. Bafty	113	Cope and Keen	497
Clement v. Beard	320	Coryton v. Litheby	59
Clerk and Dolphin	282	Cornish and Atkinson	112
— and Gilbert	88	Cornwall and Beverly	179. 180
Clerk v. Cheney	59	Corvin's Case	367
Clinch and Dacy	285	Cosen's Case	545
Clinkard and Backhurst	277. 619. 626	Cotes v. Mitchell	575
Clifton and Cotton	570	Cotton v. Clifton	570
Clithero v. Franklin	565	— v. Daintry	356. 564
— v. Higgs	549	— and Parker	387
Clobberie's Case	722. 737. 752	Courteen's Case	692
Clothworker's (Company of)		Coventry (Bishop of) and Colt	
Case	269	and Another	215
Coggs v. Bernard	406	Cowper v. Andrews	286
Coke's Case	437	Cox v. Barnsly	124. 125
Colchester (Mayor of) v.		— and St. Aubyn	278
Goodwin	269	Craker and Marborough and	
Cole and Pococke	634	King	598
Collier and Telly	300	Crane and Barrington	335
Collier's Case	325. 326	Craven v. Sanford	544
Collingwood v. Pace	219. 687	Crawley and Carter	87
Colston v. Gardiner	714	Creagh v. Wilson	740. 746. 755
Colt and Another v. Bishop		Creamer and Wicket	308
of Coventry	215	Crimes v. Smith	509
Colthirst v. Bejushin	516	Crisp v. Verral	259
Comb's Case	85	Crogatt's Case	583
Combes v. Bradley (Hund. of)	627	Crompton and North	327
Comins's Case	655	Cromwell's Case	518
Compton v. Allen	631	Crosby's Case	220
Comyn v. Kyneto	282	Crouch v. Fryer	654
Constable and Sutcliffe	332	— v. Ridden	638
		Crowther v. Goodwin	278

Cuppledike's

Cuppledike's Cafe	Page 565	Devonshire's (Earl of)	
Curly and Fleetwood	529	Cafe	Page 437. 490. 494
Currier and Dande	586	Dewel and Greeve	325
Cutler and Snow	315	Dier and Johnson	268. 529
		Dighton v. Bartholomew	10
D.		Dike v. Ricks	303
Dacy v. Clinch	285	Dimock v. Wetherell	143. 144
Daintry and Cotton	356. 564	Dimock's Cafe	438
Dale v. Philipson	596	Dixon and Prat	149
Dalton v. Selley	358	Doe v. Butlar	617. 620. 622
Dande v. Currier	586	— v. Cooper	436
Dandy and Garrett	322	Dolphin v. Clerk	282
Daniel v. Uply	518	Dorrell and Marribod	669
Darnly (Lord) and Bligh	713	Dorrington v. Edwin	593
Davers and Jones	529	Doughty v. Mal	516
David (St. Bishop of) v. Lucy	310	Downham's Cafe	30
Davies v. Mafon	580	Drake v. Biddulph	387
— and Ratcliffe	401	— and Holland	114
Davis v. Ockham	98	— v. Mayor of Exeter	670
Daw v. Swaine	191	— and Slade	648. 651. 659
Dawney v. Dee	368	Drew and Williams	581
Day v. Beddingfield	367	Drope v. Thaire	536
— and Clark	291	Duke and Jervois	729. 730
— v. Pitto	311	— and Wall	13
Dee and Dawney	368	Duncomb and Baker	143
— and Edgecombe	111	Duncombe v. Wingfield	217
Delamere v. Hefkins	528	Duppa v. Baskerville	667
Delaware's (Lord) Cafe	214. 215.	Dufgale and Robinson	721
	223. 224	Dutton v. Engram	539
Delboe and Martin	710	— and Tracy	674
Denbawd's Cafe	79	Dyfon and Others and Wilfon	539
Denning and Lucking	156. 278		
Dennis v. Statham	370	E.	
Dent v. Oliver	44	East Hundred and Pinkney	607
Derby and Athol	444. 445	Edgar and Cooper	517
— and Earl of Rivers	720. 722	Edge and Harding	714
Derby's (Earl of) Cafe	216	Edgecombe v. Dee	111
Derwentwater's (Lord) Cafe	668	Edleston v. Speak	455
		Edwards	

A Table of the Names of the Cases.

xxx

Edwards v. Freeman	<i>Page</i> 719	Fitzwilliam's v. Moore	<i>Page</i> 323
—— v. Hammond	520	Fitzwilliam's Case	315
Edwin and Dorrington	593	Fleetwood v. Curly	529
Eeley and Rundale	293	Fleming v. Waldgrave	729. 739.
Ellison and Goffin	19		740
Elme's Cafe	94. 125	Fletcher and Palmer	274
Elvis v. Archbishop of York	302	Fletcher's Cafe	10
Enfield v. Hills	86	Flexman and Chapman	3
English and Farrer	98	Foden v. Howlett	749
Engram and Dutton	539	Foot and Garrett	586
Erby v. Erby	438	Ford v. Weldon	202
Ermine and Bellafis	729. 730	Foster v. Foster	243
Etherington and Toomes	220	—— v. Hawden	525
Evans and Brereton	391	—— and Haywood	336
—— v. Finch	536	—— v. Munt	3
Ewer v. Jones	435	—— v. Pitfall	370
Exelby and Lea	98	—— and Shalmer	268. 529
Exeter (Bishop of) v. Heal	359	—— and Wiseman	730
—— (Mayor of) and Drake	670	Foster's Cafe	217
F.		Fox and Barber	98
Facy v. Lange	335	—— and Woodward	211. 224
Falkland and Bertie	516. 731.	Frampton and Terrett	89
	745. 746.	Francis v. Ley	367
Farrer v. English	98	Frank v. Frank	473
Farthing and Vicary	527	Franklin and Clithero	565
Feak and Beddingfield	638	Franklyn v. Green	722. 737. 752
Felgate and Turner	527. 575.	Frances's Cafe	117. 229
Fenner's Cafe	518	Freckleton and Ashley	368
Ferne and Linfield	330	Freeman and Edwards	719
Field v. Winlow	574	—— and Waterer	190. 193
Filkins and Bennet	247	Frenchman and Buck	428
Finch and Evans	536	Friend v. Baker	285
—— v. Newnham	714	- —— v. Duke of Richmond	149
Finch's Cafe	2. 38	—— and Norris	562
Fines (the Cafe of)	120. 121. 125	Fry v. Hordy	526
Fineux v. Hovenden	59	—— v. Porter	729. 731. 747
Fitzherbert v. Leech	599	Fryer and Crouch	654
Fitzherbert's Cafe	445	Fry's Cafe	519
Fitzwalter's Cafe	525, 526, 527	Fuller v. Fuller	220

G.		
Gainsford v. Griffith	Page 684	
Gardiner and Colston	714	
—— v. Sheldon	353. 373	
Garlick and Winter	329	
Garnett and Shuttleworth	491	
Garrett v. Dandy	322	
—— v. Foot	586	
—— v. Pritty	729	
Gee and Hill	319. 320	
Gennings and Tregare	387	
George and Hare	141	
—— and Pye	223	
—— and The Queen	523	
Gerrard and Sowle	91. 95. 539.	
	544	
—— and Wright	648. 655.	
	660	
Gibbon v. Kent	284	
Gifford and Norfolk	719	
Gilbert v. Clerk	88	
—— v. Witty	539	
Gill and Parsons	376	
Gilpin's Cafe	73	
Glascock and Tooke	121	
Gobbet's Cafe	202	
Goddard and Lovice	300	
Godfrey v. Newport	67. 145	
Godsalve and Heydon	564	
Goldsmith v. Platt	323	
Gooch's Cafe	696	
Goodall and Kemp	392	
Goodwin and Crowther	278	
—— v. Hilton	554	
—— and Mayor of Colchef-		
ter	269	
Gordon v. Rains	724	
Goslin v. Ellison	19	
Gower and Jennings	Page 517	
Grafton and Mason	536	
Gray v. Jefferies	27	
—— and Moyser	593	
—— and Willoughby	282	
Greaterchy v. Beardley	367	
Green and Franklyn	722. 737. 752	
Greesley's Cafe	79	
Greeve v. Dewel	325	
Gregg and Weldon	285	
Gresham and Scroggs	438	
Gresley v. Luther	739. 750	
Grey's Cafe	15	
Grieves v. Weigham	152	
Griffith and Gainsford	684	
Grills and Chandler	282	
Grimden and Lovelace	9	
Grosse v. Boscow	593	
Grymes v. Shack	355	
—— and Stratton	730	
Guile and Pickas	136	
Guldbank and Buckley	586	
Gunnell v. Bradish	282	
Guy and Jeffrey	305	
Gwyn v. Pool and Others	154. 190	
	278. 575	
H.		
Haigh and Webster	190. 193	
Hale and Wootten	147	
Hall v. Babb	635	
—— and Brook	635	
—— and Leak and Another	84	
	85	
—— v. Terry	718. 720. 724	
Hallett v. Birt	594. 595	
Halfey v. Carpenter	162	
Hambleton v. Vere.	12. 232	
Hammond and Edwards	520	
	Hammond	

Hammond v. Powell	Page 81	Helyar and Short	Page 282
—— v. Webb	322, 323	Helyar's Case	156
—— and Willock	325	Henley and Heath	709
—— v. Purfell	419	Herbert v. Shaw	602
Hancocke v. Prowd	332	Herbert's (Sir Wm.) Case	104
Hanger's Case	432	Hereford's (Bishop of) Case	654
Hannington and Rudyard	147	Herring and Webb	64. 83. 325.
Hanour v. Bradshaw	320		374, 375. 544, 545
Hanson v. Liversedge	330	Hertford v. Leech	655. 657
Harbert's Case	437	Heron and Piggott	655
Harcourt and Bisse	189	Helkins and Delamere	528
Hardie and Jenner	194	Heydon v. Godsalve	564
Harding v. Edge	714	—— v. Heydon	277. 619.
Hare v. George	141		626
Harrison v. Burwell	319	Hicks v. Woodson	657
—— v. Metcalf	282	Hide v. Hide	455
Harris's Case	250. 376	—— and Willans	629
Hart v. Bassett	59, 60	Higginson v. Martin	278. 575
Harvey and Alesbury	276	Higgs and Clitherow	549
Harvy and Knight	10	Higham's Case	373
—— v. Chamberlain	268. 529	Hill v. Gee	319, 320
Harward and Smith	283	Hills and Enfield	86
Harwood and Page's Case	15	Hilton and Goodwin	554
Haffer v. Wallis	492	Hind and Preston	562
Hastings v. Load	555	Hinde v. Lyon	73
Hatton v. Read	326	Hindley and Attorney General	671
Hawden and Foster	523	Hinton v. Roffey	586
Hawes v. Warner	517	Hobart and Kniffe	379
Hawkins and Slocombe	39. 315	Hobbs and Chamberlain	436
Hawley v. Simpson	90	Hodges and More	149. 283
Haymer v. Haymer	671	Hodgson v. Cook	190. 575
Haynes and Baugh	317	Holland v. Drake	114
Haywood v. Foster	336	Holland's Case	260. 360
Heal v. Bishop of Exeter	359	Holledge's Case	536
Hearn v. Allen	83	Hollett v. Sanders	565
Heath and Brown	453	Holloway's Case	17
—— v. Henley	709	Holme and Sydowne	654, 655,
—— v. Vermuden	392		656
Hedgeborrow v. Rosenden	6	Holmes v. Meynell	545
Helier v. Benhurst Hund.	536	Holt and Squib	156. 575
VOL. I.		b	Hooper

Hooper and Terry	Page 530	Jenner v. Hardie	Page 194
Hooper's Case	562	Jennings v. Gower	517
Hopkins v. Prior and Another	601	—— and Nottingham	544
Hordy and Fry	526	Jervis and Jafon	696
Horton v. Wilfon	19	Jervois v. Duke	729, 730
Hofkins and Buxoh	418	Jewke and Sutton	730
—— and Stroud	147	Imber's Case	364
Houblon v. Millner	235	Johns and Wickals	98
Hovenden and Fineux	59	—— v. Ridler	11
Howard v. Bartlett	320	Johnson v. Dier	268, 529
—— v. Wood	491	—— v. Kirman	338, 339
Howlett and Foden	749	—— v. Rowe	302
Hubbard's Case	141	—— and Smith	92
Hughes v. Phillips	117	—— v. Turk	227
—— v. Robotham	98	Jolliffe and Broad	269
—— and Stanford	634, 640	Jones v. Davers	529
—— v. Underwood	564	—— and Ewer	435
Humfry and Lathbury	157	—— v. Jones	202
Humphry and Langher	370	—— and Salmon	243
Huntington and Terry	81	—— v. Winkworth	355
Huntley and Lewkner	358	Jordan and Wilkes	598, 600
Hurd v. Lenthall	89	Jotham v. Ball	529
Hutton's Case	202	Ipſley v. Turk	601
Hye v. Wells	25	Iſeham and Withers	286
Hynton and Minn	379	Iſthead and Clarke	574

I.

Jackson and Parks	283
—— v. Warren	ib.
Jacob v. Allen	488
—— and Lawrence	563
James v. Rutlech	529
Jane and Paradine	630
Jafon v. Jervis	696
Jayfon v. Raſh	435
Jefferies and Gray	27
Jeffrey v. Guy	305
Jeffrey's Case	536
Jenkins v. Keymis	195

K.

Kebblethwaite and Stephens	276
Keen v. Cope	497
Keighley's Case	469
Kemp v. Goodall	392
Kenaſton and Tracy	139
Kent and Gibbon	284
Kirby v. Whitelow	141
Kerman and Johnson	338, 339
Keymis and Jenkins	195
Kind v. Carter	305
King v. Marborough and Cra-	
ker	598
King	

A Table of the Names of the Cases cited.

XXV

King <i>v.</i> Melling	Page 293.425. 427
— <i>v.</i> Moor	436
<i>v.</i> Rumball	544
— <i>v.</i> Twine	358
— <i>v.</i> Wendman	<i>ib.</i>
Kneeland <i>and</i> Rich	104
Knight <i>v.</i> Harvy	10
Knipe <i>v.</i> Hobart	379
Knowles <i>v.</i> Luce	84
Kyneto <i>and</i> Comyn	282

L.

Lacon <i>and</i> Lee	283
Lamplugh <i>v.</i> Braithwaite	117
Lane <i>and</i> Alexander	332
— <i>and</i> Beaver	334
— <i>and</i> Brown	530
— <i>and</i> Phelps	529
— <i>and</i> West	9
Lange <i>and</i> Facy	335
Langher <i>v.</i> Humphry	370
Langley <i>v.</i> Baldwin	425. 427
Landdown <i>and</i> Penphraze	384
Lathbury <i>v.</i> Humfry	157
Laundy <i>and</i> Pomfret	635. 641
Lavender <i>v.</i> Blackstone	696
Lawrence <i>v.</i> Jacob	563
Lea <i>v.</i> Exelby	98
Leak <i>and</i> Another <i>v.</i> Hall	84, 85
Lee <i>v.</i> Brace	459, 460
— <i>v.</i> Lacon	283
— <i>v.</i> Withers	326
Leech <i>and</i> Fitzherbert	599
— <i>and</i> Hertford	655. 657
Leicester's (Earl of) Cafe	497
Le Marchant <i>v.</i> Rawson	284
Lenthall <i>and</i> Hurd	89
Lessur <i>v.</i> Wroth	315

Levingstone v. Stoner	Page 53
Lewin and Sorrel	13
Lewis and Broadhead	661
Lewis's Cafe	39
Lewkner v. Huntley	358
Ley and Francis	367
Liford's Cafe	640
Lincoln (Bishop of) v. Cooper	654
Lindsey v. Lindsey	581
Linfield v. Ferne	330
Lifard v. Stamp	268
Lisle and Armstrong	260
— and Wharton	639
Lith and Saltenstall	195
Lithebye and Coryton	59
Littleton's Cafe	356
Liversedge and Hanson	330
Load and Hastings	555
Locky v. Locky	711
Lodge v. Weedon	59
Lofield's Cafe	65
Lomax v. Bird	663
London Sheriffs and Wilson	412
Long and Button	661
— and Rew	598, 599, 600
— and Seale	261
Long's Cafe	81
Lother and Brown	311
Loveday v. Claridge	452
Lovelace v. Grimesden	9
Lovice v. Goddard	300
Low and Wheatley	136
Lowdall and Pawsey	294
Lowndes and Quilter	392
Lucas and The Corporation of Warwick	653
Lucas's Cafe	15
Luce and Knowles	84
— and Pallyo	147
b 2	Lucking

Lucking v. Denning	Page 156.	Merchant and Smith	Page 599
	278	Merler and Carew	283
Lucy and Bishop of St. David	310	Merrick v. Spark	402. 406
Luther and Paston	149. 285	Merryland and Wilkinson	252. 339
Luther and Gresley	739. 750	Metcaif and Harrison	282
Lyon and Hinde	73	Meynell and Holmes	545
M.		Michael and Ratcliffe	268
Maby v. Shepherd	574	Michel v. Bisby	278
Madox and Selfe	714	—— and Proby	435
Magdalen College's Case	215	Mico and Attorney General	664
Mal and Doughty	516	Middleton and Parkes	162
Malapert and Salter	436	Migod's Case	136
Manning v. Andrews	353	Milbank and Bowman	168
Mannings v. Townshend	36	Mildmay's Case	216. 490. 494
Man's Case	319	Milford v. Smith	459. 460
Marborough and Craker and King	598	Miller and Robinson	296
Marcella's (Abbot de Strata) Case	152	Millner and Houlton	235
Margatren and Watkinson	320	Milton and Pattison	116. 558
Maribod v. Dorrell	669	Miner v. Hynton	372
Marriott and Roberts	332	Mires v. Solebay	594
Marsham v. Bulwer	283	Mitchill and Cotes	575
Martin v. Delboe	710	Monnings v. Monnings	664
—— and Higginson	278. 575	Montague and Bath	253
—— v. Sitwell	492	—— and Shelton	286
Martingdale v. Andrews	59	Moody and St. John	7. 44. 59
Mason v. Chambers	39	Moor and Baker	59
—— and Davies	580	—— and Chambers	285
—— v. Grafton	536	—— and King	436
Masters and Wrightwick	387	Moore and Fitzwilliam	323
Mawgridge's Case	480	More v. Hodges	149. 283
Maynard's Case	384	Moreton v. Briggs	311
Meadly v. Tomlins	647. 652	Morgan and Owen	565
Medly v. Talmy	652	Morgan's Case	89
Melburne and Spencer	268. 529	Morley v. Pragnell	59
Melling and King	293. 425. 427	Morrice and Prideaux	286
Mendyke v. Stint	278	Morris and Traffell	269
Mercer v. Tutt	401. 406	Morse v. Slue	101. 105
		Mosely and Wolley	418
		Mountague and Brook	552
		Mountjoy's	

A Table of the Names of the Cases cited.

xxxvii

Mountjoy's Case	Page 315
Moyser v. Gray	593
Mulso v. Shere	593
Munt and Foster	3
Muscot v. Ballett	305
Muffendine and Quilter	392

N.

Napper and Priddle	658. 660
Needham v. Vernon	740
Needler v. Bishop of Winchester	216
Nelson v. Smith	530
Nevil v. Bates	282
Nevison v. Whitley	586
Newnham and Finch	714
Newport and Godfrey	67. 145
Newton v. Barnadine	299. 374. 375. 545
Nichols v. Walker	82
Nindick v. Stuit	156
Noel v. Wells	150. 152
Norfolk v. Gifford	719
Norris v. Barrett	507
—— v. Friend	562
—— v. Stapes	269
North v. Crompton	327
Northampton's (Marquis of) Case	315
Nortrop and Booth	554
Norwich's (Dean and Chapter of) Case	499
Nosworthy v. Wyldeman	116
Nottingham v. Jennings	544
Nurfey and Snowling	320

O.

Obrian v. Ram	32
Ockham and Davis	98

Olive and Benson	Page 647. 652
Oliver and Dent	44
—— and Watkins	541
Ollet v. Bessy	155
Onyon v. Tryers	456
Opey v. Thomasinis	315 ⁷
Opie and Peters	90. 117
Osbaston and Whitwick	220
Osberfon and Tull	203
Osman v. Sheafe	334
Ovington and Bedford	116
Owen v. Morgan	565
Oxford's (Chancellor of) Case	55
—— (University of) Case	175

P.

Pace and Collingwood	219. 687
Packman's Case	96. 151
Page and Harwood's Case	15
Pain v. Rochester & al'	5
Paine's Case	497
Pallye v. Luce	147
Palmer and The Attorney General	618. 620, 621. 624
—— v. Fletcher	174
Pappillion v. Voice	432
Paradine v. Jane	630
Parker v. Cotton	387
Parkes v. Middleton	162
Parks v. Jackson	283
Parson's Case	319
—— v. Gill	376
Partridge and Bray	191
—— and Payne	342
Paston v. Lusher	149. 285
Paternoster and Webb	549, 550
Patridge's Case	220
Pattison v. Milton	116. 558
Paul (St. Dean and Chap. of) v. Capell	322
b 3	Pawlet

Pawlet v. Pawlet	Page 719. 722.	Pool v. Archer	Page 631
	742. 747	— and Others and Gwyn	154.
Pawsey v. Lowdall	294		190. 278. 575
Payne v. Partridge	342	Popham v. Bamfield	426
Peake and Ball	117	Pordage's Case	312
Peirce and Perryman	2	Porter and Butcher	592
Peitoe's Case	142. 570	— and Fry	729. 731. 747
Pelles v. Brown	325	Portington's Case	518
Pembroke's Case	564	Poultney and Attorney General	389, 390
Pennington v. Platt	334	Powell and Hammond	81
Penny and Butts	355	— v. Winde	262
Penphraze v. Lansdown	384	Powers and Prior	526
Perrin v. Bud	191	Powlter's Case	215
Perryman v. Peirce	2	Pragnell and Morley	59
Peters v. Opie	90. 117	Prat v. Dixon	149
Petre v. Woodroffe	307	Presgrave v. Saunders	592
Phelps v. Lane	529	Prestley and Chantflower	147
Phettiplace and Yates	719. 722.	Preston v. Hind	562
	738. 742. 756	Price's Case	598. 600
Phillips and Hughes	117	Pridde v. Napper	658. 660
Philpston and Dale	596	Prideaux v. Morrice	286
Pickas v. Guile	136	Prince's Case	111. 216
Pierce and Acton	671	Prior v. Powers	526
Piggott v. Heron	655	— and Another and Hopkins	601
Pigot v. Pigot	302	Pritty and Garrett	729
Pigot's Case	110. 112	Proby v. Michell	435
Pike v. Puleyn	114	Prowd and Hancocke	332
Pinchon's Case	437	Prowse v. Abingdon	718. 720.
Pinkney v. East Hund.	667		724
Pinnell's Case	142	Puleyn and Pike	144
Pitfall and Foster	370	Purefoy v. Rogers	46. 353
Pitto and Day	311	Purfell and Hamond	419
Pix and Burditt	146	Pye v. George	223
Plater's Case	132		
Platt and Goldsmith	323		
— and Pennington	334		
Playter's Case	419		
Plummer v. Webb	549, 550		
Pococke v. Cole	634		
Pollet and Worlich	452		
Pomfret v. Laundry	635. 641		
— v. Ricroft	549		

Q.

Queen v. George	523
Queen's College Oxford (Case of)	124
Quilter v. Lowndes	392
— v. Muffendine	ib.

R.	
<i>Rains and Gordon</i>	Page 724
<i>Ram and Obrien</i>	32
<i>Rand v. Cartwright</i>	669
<i>Randal and Allein</i>	633
<i>Rath and Jayson</i>	435
<i>Ratliffe v. Davies</i>	401
—— <i>v. Michael</i>	268
—— <i>and Roper</i>	572
—— <i>and Sheffield</i>	121. 216.
	219
<i>Rawson and Le Marchant</i>	284
<i>Rea v. Barnes</i>	567
<i>Read v. Hatton</i>	326
—— <i>and Smith</i>	665. 673
—— <i>v. Wilmot</i>	576
<i>Read's Case</i>	303
<i>Reed and Walley</i>	539
<i>Reeve and Tregmiell</i>	674
<i>Reeves v. Winnington</i>	338, 339
<i>Rennington's case</i>	320
<i>Rew v. Long</i>	598, 599, 600
<i>Reynolds v. Buckle</i>	11
<i>Rich v. Kneeland</i>	104
—— <i>and Ward</i>	26
<i>Richard v. Bowler</i>	575
<i>Richards and Speake</i>	391
<i>Richardson and Sedgwick</i>	284
<i>Riches v. Briggs</i>	136
<i>Richmond (Duke of) and Friend</i>	149
<i>Ricks and Dike</i>	303
<i>Ricroft and Pomfret</i>	549
<i>Ridler and Johns</i>	11
<i>Rifden and Crouch</i>	638
<i>Rivers (Earl of) v. Derby</i>	720. 722
<i>Robbins v. Standard</i>	358
<i>Roberts v. Marriott</i>	332
—— <i>v. Trenayne</i>	586

<i>Roberts and White</i>	Page 421
<i>Robinson v. Dufgale</i>	721
—— <i>v. Miller</i>	296
<i>Robotham and Hughes</i>	98
<i>Rocheffer & Al' and Pain</i>	5
<i>Roffey and Hinton</i>	586
<i>Rogers and Purefoy</i>	46. 353
<i>Rookeby and Statre</i>	342
<i>Roper v. Ratcliffe</i>	572
—— <i>v. Roper</i>	676
—— <i>and Wiseman</i>	708
<i>Rossenden and Hedgeborrow</i>	6
<i>Rowe and Johnson</i>	302
<i>Royley's Case</i>	15
<i>Royston v. Barton</i>	143
<i>Rudyard v. Hannington</i>	147
<i>Rumball and King</i>	544
<i>Rundale v. Eeley</i>	293
<i>Rutlech and James</i>	529

S.

<i>Sainthill and Warren</i>	8
<i>Salford's Case</i>	332
<i>Salisbury's (Bishop of) Case</i>	286
<i>Salmon v. Jones</i>	243
—— <i>and Talbot</i>	647. 652
<i>Salltenstall v. Lith</i>	195
<i>Salter v. Malapert</i>	436
—— <i>and Tasker</i>	9
<i>Sanders and Hollett</i>	565
<i>Sandford and Craven</i>	544
<i>Sands v. Bladwell</i>	710
<i>Sand's Case</i>	97
<i>Sarsfield v. Wetherley</i>	5
<i>Saunders and Presgrave</i>	592
<i>Savage's Case</i>	370
<i>Scroggs v. Gresham</i>	438
<i>Scroop's Case</i>	570
<i>Searle v. Long</i>	261
—— <i>v. Williams</i>	215
<i>Sedgwick</i>	

Sedgwick v. Richardson	Page 284	Smith and Biggot	Page 46
Selfe v. Madox	714	— v. Bowen	149. 260
Selley and Dalton	358	— and Crimes	509
Semphill v. Bayley	743. 754	— v. Harward	283
Seymour's Cafe	120. 130. 453	— v. Johnson	92
Shack and Grymes	355	— v. Merchant	599
Shalmer v. Foster	268. 529	— and Milford	459. 460
— v. Slingsby	306	— and Nelson	530
Shaw and Herbert	602	— v. Read	665. 673
— v. Sherwood	89	— v. Smith	719. 722
Sheafe and Osman	334	— v. Stafford	68. 69
Sheffield v. Ratcliffe	121. 216. 219	— and Weyman	278
Sheldon and Gardiner	353. 373	Snelling and Squibb	714
Shelley's Cafe	459. 460. 629	Snow v. Cutler	315
Shelton v. Montague	286	Snowling v. Nursey	320
Shepherd and Maby	574	Solebay and Mires	594
Shere and Mulfo	593	Sonday's Cafe	292. 374. 375. 426.
Sherrington's Cafe	437		545
Sherman v. Withers	711. 712	Sorrel v. Lewin	13
Sherwood and Shaw	89	Southampton (Duke of) and	
Shirley and Bucher	285	Wood	732
Sholler and Smartle	373	Southcot's Cafe	102. 134
Short v. Helyar	282	Sowle v. Gerrard	91. 95. 539. 544
Shrewsbury's (Earl of) Cafe	84.	Spalding v. Spalding	64
	124	Spark and Merrick	402. 406
Shuttleworth v. Garnet	491	Speak and Edleston	455
Simpson and Beal	305	Speake v. Richards	391
— and Hawley	90	Specott's Cafe	359
Sitwell and Martin	492	Speer's Cafe	92
Slackoe and Walker	419	Spencer v. Melburne	268. 529
Slade v. Drake	648. 651. 659	Spencer's Cafe	23
Slater and Blockley	8. 44	Spicer v. Spicer	325. 326
— v. Smallbrook	310	Squib v. Holt	156. 575
Slingsby and Shalmer	306	— v. Snelling	714
Slocomb v. Hawkins	39. 315	Stafford v. Bateman	53
Slocomb's Cafe	268. 528	— and Smith	68. 69
Sloper and Child	283	Stafford's Cafe	127
Slue and Morfe	101. 105	Stamp and Lisard	268
Smallbrook and Slater	310	— and Turberville	526
Smartle v. Sholler	373	Standard and Robbins	358
		Stanford	

A Table of the Names of the Cases cited.

xli

Stanford v. Cooper	Page 548	Talmy and Medly	Page 652
—— v. Hughes	634. 640	Talker v. Salter	9
Stapleton v. Cheele	722. 737. 752	Tatam and Upchard	355
Stapes and Norris	269	Taverner's Case	15
Starkey and Bade	111	Taylor and Chambers	5
Starre v. Rookeby	342	Temple v. Temple	17
Statham and Dennis	370	Tendring Hundred and Camb-	
St. Aubyn v. Cox	278	ling	284
Stephens v. Brittridge	565	Terrett v. Frampton	89
—— and Case	536	Terry and Hall	718. 720. 724
—— v. Kebblethwaite	276	—— v. Hooper	530
Sterling and Turner	286	—— v. Huntington	81
Stiles and Stoke	176	Tey's Case	127
Stint and Mendyke	278	Thaire and Drope	536
St. John v. Moody	7. 44. 59	Thomas v. Willoughby	250
St. John's Case	132	Thomasius and Opey	315
Stoke v. Stiles	176	Thompson and Clark	69
Stoner and Lerington	53	Thorp's Case	98
Strange's Case	282	Tilden v. Walter	638
Stranham's Case	141	Tilly v. Collier	300
Stratton v. Grymes	730	Tindall and Uvedall	638. 639
Strike v. Bensley	305	Tivell and Webber	710
Stringer and White	696	Tomkins v. Bennett	485
Stroud v. Hoskins	147	Tomlins and Meadly	647. 652
Sruit and Nindick	156	Tooke v. Glascock	121
Stukely and Aris	491	Toomes v. Etherington	220
Sugg and Wheadon	418	Tournay v. Tournay	719
Sutcliffe v. Constable	332	Townsend and Mannings	36
Sutton v. Jewke	730	Tracy v. Dutton	674
Swaine and Daw	191	—— v. Kenaston	139
Sweeting and Attorney General		—— v. Talbot	536
	618. 622. 624. 626	Trassell v. Morris	269
Sydowne v. Holme	654. 655. 656	Tredway's Case	212. 572. 674
		Tregare v. Gennings	387
		Tregmiell v. Reeve	674
		Tregose v. Wennell	593
		Trenayne and Roberts	586
		Trencher's Case	284
		Tresham's Case	152
		Trevor	
T.			
Talbot v. Salmon	647. 652		
—— and Tracy	536		

<i>Trevor v. Trevor</i>	Page 416.	431	<i>Waggoner's Case</i>	Page 269
<i>Trot and Benton</i>		661	<i>Wakeman v. Waker</i>	41
<i>Tryers and Onyen</i>		456	<i>Waker and Wakeman</i>	<i>ib.</i>
<i>Tull v. Osberfon</i>		203	<i>Waldgrave and Fleming</i>	729. 739.
<i>Turberville v. Stamp</i>		526		740
<i>Turk and Johnson</i>		227	<i>Walford v. Bener's Hundred</i>	285
— and Ipsley		601	<i>Walker and Nichols</i>	82
<i>Turner v. Felgate</i>	527.	575	— v. Slackoe	419
— v. Sterling		286	<i>Walker's Case</i>	586
<i>Turner's Case</i>		17	<i>Wall v. Duke</i>	13
<i>Tutt and Mercer</i>	401.	406	<i>Walley v. Reed</i>	539
<i>Twine and King</i>		358	<i>Wallis and Haffer</i>	492
U.			<i>Walsingham's Case</i>	219. 220
<i>Ughtred's Case</i>		518	<i>Walter v. Bould</i>	548
<i>Underwood and Hughes</i>		564	— and Tilden	638
<i>Upchard v. Tatam</i>		355	<i>Walthoe and Wright</i>	452
<i>Uply and Daniel</i>		518	<i>Walton v. Waterhouse</i>	631
<i>Uther and Burrowes</i>		529	<i>Ward v. Britton</i>	638
<i>Uvedall v. Tintall</i>	368.	639	— v. Rich	26
V.			<i>Warkhouse and Chambers</i>	355
<i>Van v. Clark</i>	718. 720.	724	<i>Warner and Hawes</i>	517
<i>Vanderbergh v. Blake</i>		191	— and Webb	656
<i>Vaughan and Woodroffe</i>		530	<i>Warr v. Warr</i>	719
<i>Vavafor v. Baile</i>		419	<i>Warren and Jackson</i>	283
<i>Vere and Hambleton</i>	12.	232	— v. Sainthill	8
<i>Vermuden and Heath</i>		392	<i>Warwick (Corporation of) v.</i>	
<i>Vernon and Adney</i>		575	Lucas	653
— and Needham		740	<i>Waterhouse v. Baude</i>	191
<i>Vernon's Case</i>	106. 303.	370	— and Walton	631
<i>Verral and Crisp</i>		259	<i>Waterer v. Freeman</i>	190. 193
<i>Vicary v. Farthing</i>		527	<i>Watkins v. Oliver</i>	541
<i>Vincent and The Attorney</i>			<i>Watkinson v. Margatren</i>	320
General		664	— and Worthy	<i>ib.</i>
<i>Voice and Papillion</i>		432	<i>Watts v. Brayne</i>	259. 260. 526
W.			<i>Wave and Chafe</i>	23
<i>Wade and Britton</i>		508	<i>Webb v. Batchelor</i>	266. 537
<i>Wade's Case</i>		117	— and Hammond	322. 323
			— v. Herring	64. 83. 325. 374.
				375. 544. 545
			— v. Paternoster	549. 550
				Webb

A Table of the Names of the Cases cited.

xliii

Webb and Plummer	Page 549, 550	Williams and Searle	Page 215
— v. Warner	656	Willock v. Hammond	325
— and Wood	732	Willoughby v. Gray	282
Webber v. Tivell	710	— and Thomas	250
Webster and Cary	486, 489	Wilmot and Read	576
— v. Haigh	190, 193	Wilson v. Chambers	141, 355
Weedon and Lodge	59	— and Creagh	740, 746, 755
Weigham and Grieves	152	Wilson v. Dyfon and Others	539
Welden and Ford	202	— and Horton	19
— v. Gregg	285	— v. London Sheriffs	412
Wells and Hye	25	Winchester (Bishop of) and	
— and Noel	150, 152	Needler	216
Wendman and King	358	Winchester's (Bishop of) Case	647, 648, 649, 654
Wennel and Tregose	593	Winckworth and Jones	355
West v. Lane	9	Winde and Powell	262
Westby's Case	155	Wingfield and Duncombe	217
Wethwell and Dimock	143, 144	Winlow and Field	574
Wetherley and Sarsfield	5	Winnington and Reeves	338, 339
Weyman v. Smith	278	Winter v. Bermingham	667
Wharton v. Lisle	639	— v. Garlick	329
Wheadon v. Sugg	418	Wiseman v. Foster	730
Wheatley v. Best	188, 581	— v. Roper	708
— v. Low	136	— v. Wiseman	530
White v. Roberts	421	Withers v. Ifeham	286
— v. Stringer	696	— and Lee	326
Whitelow and Kerby	141	— and Sherman	711, 712
Whiting and Wilkins	293	Witty and Gilbert	539
Whitley and Nevison	586	Wolley v. Mofely	418
Whitlock's Case	315	Wood v. Avery	631
Whitwick v. Osbaston	220	— v. Duke of Southampton	732
Wickals v. Johns	98	— and Howard	491
Wicket v. Creamer	308	— v. Webb	732
Widdrington and Christ		Woodcock and Bateman	276
Church College	589	Woodroffe and Petre	307
Wilde's Case	292	— v. Vaughan	530
Wilkes v. Jordan	598, 600	Woodson and Hicks	657
Wilkins v. Whiting	293		Woodward
Wilkinson v. Merryland	252, 339		
Willans v. Hide	629		
Williams v. Drew	581		

A Table of the Names of the Cases cited.

Woodward v. Bonithan	Page 75	Wroth and Lepur	Page 315
—— v. Fox	211. 224	Wyat v. Aland	284
Wootten v. Hale	147	Wyldeman and Nofworthy	116
Worcester's (Dean and Chap- ter of) Cafe	317	Wyndham's Cafe	497
Worlich v. Pollet	452	Y.	
Wormall's Cafe	16	Yale's Cafe	389
Worrall v. Atworth	329	Yates v. Phettiplace	719. 722.
Worthy v. Watkinson	320		738. 742. 756
Wrenford and Ashfield	567	Yelverton v. Yelverton	243
Wright and Bannister	654. 657	Yeoman v. Barftow	586
—— v. Gerrard	648. 655. 660	York (Archbishop of) and Brickhead	360
—— v. Walthoe	452	—— and Elvis	302
Wright's Cafe	648	Young v. Young	149
Wrightwick v. Masters	387		

E R R A T A.

Page xxi. of the Table of the Cases *after* *Prideaux v. Roberts*,
instead of 251 read 231.

6. line 20. *after* *accepts dele of.*

6. in margin, *for* 2 Freem. read 1 Freem.

15. in note, *after* *heat dele of.*

20. l. 10. in margin, *for* cattle read chattel.

62. in margin, *for* where read when.

207. in margin, *for* bread read bred.

229. in margin, *after* 8 Co. read 91. b.

247. in note, *after* *conufance* read or.

272. in note, *for* natural read material.

471. l. 16. *for* Geo. 2. read Geo. 1.

640. in note *for* alterations read alteration.

D E

Term. Sanct. Hill.

7 Will. III. in B. R.

Sir John Sommers, *Keeper of the Great Seal.*

Sir John Trevor, *Master of the Rolls.*

John Holt, *Knight, Chief Justice.*

William Gregory, *Knight,*
Thomas Rookesby, *Knight,* } *Justices of the King's Bench.*
Samuel Eyre, *Knight,*

George Treby, *Knight, Chief Justice.*

Edward Nevil, *Knight,*
John Powell, *Knight,* } *Justices of the Common Pleas.*
John Powell, *Knight,*

Edward Ward, *Knight, Chief Baron.*

Nicholas Lechmere,
John Turton, } *Barons of the Exchequer.*
Littleton Powys, *Knight,*

Culliford *vers.* Cardonell.

Case 1.

IN debt upon bond the defendant demanded Oyer, by which it appeared, it was made to render an account to the plaintiff of the profits of an office in the Custom-house and to pay him the half-part of them; and afterwards pleaded, that by the statute 5 & 6 Ed. 6. cap. 16.

Bond for deputy to pay half the profits of an office being within the stat. 5 & 6 Ed. 6. c. 16. to the Principal, and to

retain the other half to himself is good.—Otherwise had it been for a sum certain. 2 Salk. 466. S. C. Comb. 356. S. C. 12 Mod. 90. S. C. Holt 506. S. C. 2 Burn's Eccl. Law. p. 43. Gib. Cod. 980.

CULLIFORD
v. CAR-
BONELL.

If any person shall sell any office, or deputation of any office, &c. or take any money, bond, &c. for any office, or deputation of any office, which concerns the administration of justice, &c. or any of the king's customs, &c. he shall forfeit (1) office and right of deputation, &c. and such bond shall be void; And that the defendant was made deputy to the plaintiff in his office in the Custom-house, who took his bond corruptly for the grant of such deputation. Upon which there was a demurrer; and adjudged for the plaintiff; for, his bond is not within the statute of 6 Ed. 6. being only for part of the profits, which the defendant receives, and is no more than if the plaintiff make a deputy and allow him a salary; for here he allows the defendant a moiety of the profits for his salary, and the security taken for the other moiety is not a sale or corrupt bargain for the deputation; otherwise if the defendant had given a sum in gross at first, or had given covenant for a certain sum to be annually paid the plaintiff. (2)

Judgment for the plaintiff.

6 Mod. 234.

2 Salk. 468.

S. C.

3 Salk. 251.

S. C.

4 Burr. 2497.

7 Keb. 552.

639. 711. 717. Forreft. 106. 3 Bac. Abr. 731. 4 Com. Dig. 298. Vis. Abr. tit. *Officers and Offices*, (O. 3.) pl. 17, 18. p. 129.

(1) And the King cannot restore him, "for a person disabled by a statute cannot be enabled by the king." Hob. 75. 3 Inst. 154. 2 Hawk. P. C. 6th edit. p. 559.

(2) It was determined in the case of

Blankard v. Gald, 2 Salk. 411. Comb. 228. S. C. 4 Mod. 215. S. C. Holt 341. S. C. 2 P. Wms. 75. 4 Burr. 2494. 2 Ld. Raym. 1245. That this statute extends not to *Jamaica* or to the Colonies.

Cafe 2.

Haines *versus* Jeffreys.

A marriage with an illegitimate relation who is within the Levitical degrees is illegal. Comb. 356. S. C. 1 Ld. Raym. 68. S. C. 5 Mod. 268. S. C. 2 Burn's Eccl. Law 415. Gib. Cod. 413. Vin. Abr. tit. Marriage, E. pl. 11. p. 257.

Prohibition was prayed to the Spiritual Court, where there was a libel for an incestuous marriage, for the plaintiff had married a bastard of his sister. And Sir *Barth. Shower* urged, that this was not within the degrees prohibited by the statute of 32 Hen. 8. (1) for a bastard was not the daughter of any one. 1 Inst. 123. 157. 6 Co. 65. A bastard is the son of no one, nor has any relation, but is the fountain or original of his own blood, for he derives blood of no one. 41 Ed. 3. 9. b. 1 Bendl. 102.

Swinb. 5th edit. 95. Seld. de Jure Heb. lib. v. cap. 10. fol. 544.

Dobbins on the other side quoted the argument of the Bishop of *Worcester*; and he says, the words in *Leviticus*, which we translate, *you shall not approach to your next of kin*, in the *Hebrew* tongue is, *you shall not approach to the remainder of your flesh*; the vulgar *Latin* says, *ad proximam sanguinis sui*, by which it appears, that the intent of the prohibition was to prohibit an approach to any that was of his blood, and so the expositors extend this precept to persons who proceed as well from an illegitimate, as from a lawful embrace. *Vide 99 Can. 1603. 2 Inst. 683.* Lord Chief Justice held, and all the Court seemed to think, it would be very mischievous if a bastard should not be accounted within the statute 32 *Hen. 8.* for by that rule a man might marry his own daughter; and where it is said, that a bastard is the son of no one, this is in civil respects, and where there is an inheritance.

HAINES &
JEFFREYS.

[3]

2 Str. 2162.

Petit and Petit, Executors of Richard Petit, Case 3.
vers. Smith.

PROHIBITION was moved for to the Spiritual Court, where it was attempted to make the executors distribute according to the statute of distribution 22 & 23 *Car. 2. c. 10.* And upon a consultation it was urged, that executors are only trustees of the goods of the testator, and have them to administer according to the intention of the testator, and where they have paid his debts and legacies, then it is but reasonable that they distribute the surplus to the next of kin to the testator; and there was a case cited of a decree in Chancery between (2) *Frost, al' Forrest, v. Munt, (a)*, where the testator had made the defendant his executor, and devised to him as follows, *viz. I give unto my executor the sum*

Executors (1) are not compellable by the Spiritual Court to make distribution according to the statute of 22 & 23 *Car. 2.* *Ld. Raym. 86. S. C. 363. 1 P. Wms. 7. S. C. Comb. 378. S. C. 5 Mod. 247. S. C. 2 Eq. Abr. 434. pl. 13. S. C. 4 Burn's Eccl. Law 342. Vin. Abr. tit. Executors. Z. 7. pl. 7. O. b. pl. 10.*

(a) 1 Vern. 473. 1 Eq. Abr. 243. S. C. 1 P. Wms. 550. 1 Str. 673.

(1) "An executor from his name is
"but a trustee, he being to execute
"his testator's will, and therefore cal-
"led an executor. And this is the
"reason why the Spiritual Courts can-
"not compel a distribution, *because*

"*they cannot enforce the execution of a*
"*trust.*" 1 P. Wms. 549.

(2) The name of this case is
mistaken in the text, it is *Foster v.*
Munt.

PETIT v.
SMITH.

of 5 *l.* only; and it was decreed, that the executor should be accountable for the residue; for the intent of the testator appeared to be, that his executor should have only 5 *l.* But the Court here inclined, that a prohibition should go; for the case cited depended upon the special words of the will, and did not extend to the present case. (3)

At the end of Easter Term, 7 Will. 3. Sir William Gregory, one of the Justices of the King's Bench, died; and in the Trinity Term following Sir John Turton, one of the Barons of the Exchequer, was removed to the King's Bench, and took the third seat in that Court.

(3) Prohibition was granted in this case, and afterwards *Smith* brought a bill in Chancery against the executors for an account of the surplus, and the Court decreed that such surplus should go according to the statute of distribu-

tions. 1 P. Wms. 9. The executors in this instance had legacies left them. 1 P. Wms. 7. so that this case is not distinguishable from that of *Foster v. Munt*, but they are both governed by the same principle.

D E

Term. Sanct. Trin.

8 Will. III. in B. R.

Hussey *vers.* Jacob.

Case 4.

Assumpsit. The plaintiff declares upon the custom of merchants, by which, if a bill of exchange is drawn upon a person, and he accepts it, he is liable to pay it; that the Lord Chandos had drawn a bill upon the defendant for the payment of 120 pieces of gold, called *Guineas*, to the plaintiff, and the defendant accepted thereof, and afterwards refused payment. The defendant pleads the statute 16 Car. 2. c. 7. and that the plaintiff had played with the Lord Chandos at a game called *Hazard*, and that the Lord Chandos had lost 120 guineas, and this bill was given for the security of that money. Upon which it was demurred: And argued by Sir Barth. Shower for the plaintiff, that this plea amounts to the general issue; for on *non assumpsit* pleaded he might give the statute of 16 Car. 2. c. 7. in evidence, and therefore he shall not be admitted to plead the special matter, where it may be given in evidence upon the general issue. *Sed non allocatur*; for in every case, where the defendant may avoid the action of the plaintiff for matter of law, he may there plead specially, notwithstanding that the same matter may be given in evidence upon the general issue, and shall not be obliged to take the general issue, and leave the matter of law to the verdict of a jury; as in an action brought upon a bond, the defendant may plead that she was under coverture at the time, although such matter may be given in evidence upon *non est factum* pleaded; and in conspiracy,

When a man shall avoid a bill for money lost at play by the statute of 16 Car. 2.
1 L. Ray. 87.
S. C. 1 Salk.
344. S. C.
Carth. 356. S. C.
5 Mod. 170.
175. S. C. 12
Mod. 96. S. C.
Hob. 28. S. C.
3 L. Raym. 93.
2 Burr. 108.

In many cases a defendant has it in his election to plead a matter specially, or give it in evidence upon the general issue.
Vin. Abr. tit. Evidence. Z. 2.
pl. 79. 80. 89.
2 Vent. 295.
1 Rich. Pr. K.
B. 238 infra.
p. 274. Comb.
60. Skinn. 1.

152. 1 Ld. Raym. 125. 217, 393, 566, 727. Hob. 127. Carth. 357. 4 Bac. Abr. 60. Skinn. 1.

HUSSEY v.
JACOB.

(a) 1 Show.
125. S. C.
Carth. 82. S. C.
Comb. 45. 152.
S. C.

the defendant may well shew a probable cause for his suspicion in his plea, and is not obliged to plead the general issue. *Cro. Eliz.* 871, 900. 1 *Vent.* 2. 2 *Vent.* 295. (a). 2dly, That the defendant cannot have the advantage of the statute 16 *Car.* 2. c. 7. for the money is not lost by him, but the action lies against him upon another contract, (1) for the acceptance of the bill makes the defendant chargeable; and if a man promises another, that if he will forbear to sue him for so much money, which was won at play, he will pay at such a time; *assumpsit* lies upon such promise, for there is another consideration, the forbearance being the cause of the promise: And the mischief will be very great, if a person may avoid payment upon a bill after his acceptance of it, for that the original cause of such bill was upon an usurious contract, or for gaming, &c. If the plaintiff had sent his bill to *Constantinople*, and it had been there accepted, should it be avoided there for that it was given for money won at play? Such a construction would be very prejudicial to trade; so in this case it is not said, that the acceptance by the defendant was for the security of the money which the plaintiff won at dice. *Sed non allocatur*; for the acceptance by the defendant was not upon another consideration, but was a better assurance for the money due from the Lord *Chandos*; and the statute avoids all contracts, judgments, bonds, bills, &c. and other acts, deeds or securities whatsoever given for security or satisfaction of such money; so that the statute is not restrictive as to securities made by the party only who loses the money, but also for those made by any other person for him: And if a man gives security for money that *A.* had lost (at play) it is void, as much as if he had given it himself: And altho' the plea does not say, that the defendant accepted the bill for a further security, &c. yet it is said, that the plaintiff had won 120 guineas at hazard of the Lord *Chandos*, who drew the bill upon the defendant for the security of the same 120 guineas, and the defendant accepted of the same bill; by which it appears, that it was for security of the same 120 guineas; and the mischief that has been urged is not within the present case. And *Holt C. J.*

The acceptor of a bill of exchange drawn upon him for a debt exceeding 100l. incurred at play, may plead St. 16 Car. 2. c. 7. 6 Mod. 129. Vin. Abr. tit. Bills of Exchange, K. pl. 1. O. pl. 22. All securities given by a third person for money lost at play are equally void with those given by the party himself. 1 Will. 220.

(1) "The indorser, by superscribing makes in effect a new bill of Exchange." Comb. 32.

thought, and it was not denied by any of the judges, that if the plaintiff had assigned his bill to another person for satisfaction of a just debt due to him from the plaintiff, and the defendant had accepted it, this would have been a lien upon the defendant to such third person; as where a man makes an usurious contract to *B.* for payment of money due to *B.* and *B.* is indebted in the same sum to *C.* and *B.* for satisfaction of the debt which he owes *C.* makes the man give his bond to pay to *C.* the same sum, which he owes to *B.* upon the usurious contract; such person shall not avoid the payment to *C.* because of the usurious contract made with *B.* But Sir *Bartolomew Shower* said, that then if a man loses at dice, and gives a bill payable to the winner, or order, for the money, and the winner indorses the bill to another, he shall avoid the statute 16 *Car. 2. c. 7.* But *Holt* answered, that this was not the case in question; but that his opinion was, that if such a note was given to the winner or order, and the winner indorsed it to a stranger for a just debt, and the person upon whom the bill was drawn, accepts of it in the hands of the stranger, the acceptor would be liable.

3dly, It does not appear by the plea, that the Lord *Chandos* and the plaintiff played upon tick or credit, and the statute does not avoid the payment where the plaintiff plays with ready money. *Scd non allocatur*; for it is said, that the plaintiff and the Lord *Chandos* played together, and that the Lord *Chandos* lost 120 guineas, and that for security of them the bill was given, which shews that the play was not for ready money, and then it is within the statute. And *Holt C. J.* said, that it had been lately adjudged, that where an agreement was made for an horse-race, to run four heats at 40 *l.* a heat, and as many more as the parties should agree, and an action was brought for the money lost upon two heats only, which was within the sum of 100 *l.* yet it was within the statute; for the agreement was intire for four heats, which amounts to above 100 *l.* and although it happened that only two heats were run, yet the plaintiff should not recover for them. See the case now reported by *Ventris. 1 Vent. 253.* And judgment in the principal case here was given for the defendant.

MURRAY v.
JACOB,

Otherwise where a security is given by the loser to a bona fide creditor of the winner.
2 Mod. 279.
Yelv. 47.
Cro. Jac. 32.
Moor 752.
1 Brownl. 85.
Vin. Abr. tit. Gaming. A. pl. 4. B. pl. 2.

2 Str. 1155.
5 Com. Dig. 648.
4 Com. Dig. 80.
Doug. 3d edit. 741, 742.
Gillb. Ch. 289.

It is not necessary that the plea should state that the parties played upon tick. The bill that was given shews it.

An agreement to run four heats at a horse-race for 40 *l.* each heat, is void by this statute.
3 Keb. 254. 259.
2 Lev. 94.
2 Mod. 54.
3 Salk. 175.
2 Freem. 200.
352.
It is one entire contract tho' the wagers are distinct.

Case 5.

Stroud *vers.* Birt.

Where the plaintiff is not obliged in his declaration to shew any title in himself.

4 Mod. 411,
418. S. C.
12 Mod. 97. S. C.
Skin. 621. S. C.
Comb. 370.
S. C. 3 Salk.
72. S. C.
3 Willf. 456.
2 Blackf. 817.
926. 1 Str. 5.
Nl. Pri. 76.
Cro. Elis. 419.
1 Vent. 264,
319, 356.
Cro. Jac. 41,
222. 3 Keb.
220. Cro. Car.
600.
Carth. 84.
4 Bac. Abr. 15.
and the cases
there cited.
5 Com. Dig. 39.
and the cases
there cited.
Iustia 44. 341.

In an action against a stranger the plaintiff need not shew title.

1 Ld. Raym.
266. 2 Ld.
Ra. m. 751.
1093. 1 Str. 6.
Title must be
shewn, if
brought against
an owner of the
soil. 1 Str. 6.
(a) 2 Lev. 128.
1 Vent. 274.
3 K. b. 528.
531.

ERROR on a judgment in the common pleas in an action upon the case, wherein the plaintiff declared, that he was possessed of a certain ancient mill and certain lands in *Shipton Mallet*, and ought to have common in 100 acres of lands, called *Mendip Forest*, for all commonable cattle levant and couchant upon the said lands; and that the defendant dug coney-burrows, and stocked the said common with conies, by which he could not have the use of the said common in so beneficial a manner. Upon which the defendant demurred; for that the plaintiff had not shewn any title to the common, either by grant or prescription; And judgment was given in the Common Pleas for the plaintiff. And upon error brought in *B. R.* the same error was assigned; but the judgment was affirmed by the whole court, And *Holt C. J.* gave the causes of their judgment, *viz.* The plaintiff is not obliged to shew any title in himself to the common in his declaration. *1st*, Because this action is founded only upon the possession, which is sufficient to maintain the action for the plaintiff. *2dly*, Title to the common need not be alledged by the plaintiff; for that it did not appear whether the defendant who committed the tort was owner of the soil or a stranger; but if the defendant had appeared to be owner of the soil, then the plaintiff must have shewn a title; As in case the plaintiff had brought an action of trespass for the taking of his cattle, and the defendant had justified the taking for damage-feasant in his freehold; there the plaintiff in his replication must shew that he had common in the same place, either by grant or by prescription. *3dly*, The title of the plaintiff is not traversable by the defendant, but if it were necessary, the plaintiff might give it [the title] in evidence: And the principal case upon which the court relied was a judgment of *Mich.* term 27 *Car. 2.* between *St. John* and *Moody*, (a) where in an action on the case the plaintiff declared, that he was seised in fee of twenty acres of wood, and that the defendant stopped up a way which the plaintiff had to the wood, but did not shew any title to the way; and after verdict for the plaintiff, this was moved in arrest of judgment; and by *Hale C. J.* and all the court, judgment was given for the plaintiff;

STRECH v.
SLATOR.

tiff; which is an express authority in point; and although the plaintiff in that case declared that he was seised in fee, it is no more than if he had said that he was in possession; for it is not material to alledge a seisin in fee, but where the party makes prescription to a common, a way, &c. This case was after a verdict indeed; but *Hale* and the whole court agreed, that the same rule should have been given in it if it had been before a verdict; as *Holt C. J.* said he well remembered. And *Rookeby* Justice said, that the Judges all agreed in the judgment in the principal case, for the reasons declared by the Chief Justice; and begged leave to mention a case adjudged in the Common Pleas between *Blockley* and *Slator*, (a) *Hill. 4 & 5 W. & M. rot. 1771*. An action on the case was brought for stopping up a way, and there was a demurrer to the declaration; and it was divers times argued that the declaration was ill, for that the plaintiff had not shewn any title to the way; and after much debate, it was adjudged for the plaintiff; which he took to be the same case with the present, except that there the plaintiff claimed an easement, and in the present case an interest. But *Holt C. J.* said, that a way to a church, &c. was no more than an easement, but that a private way to a particular estate seemed to be an interest; and judgment was affirmed by the whole court. *Vide 2 Vent. 186. 1 Vent. 274, 275. 2 Vent. 292.*

(a) 1 Lutw. 119.

Jones *vers.* Bodingham, in B. R.

Case 6.

Trespas for taking cattle. The defendant pleads, that upon a transcript of a *capias utlagatum* and inquisition from the Common Pleas, a *levari facias* issued out of the exchequer, tested *Hill. 6 W. & M.* and a warrant thereupon to the defendant as bailiff, by virtue of which he took the cattle in such land of the person outlawed. The plaintiff replies, that the cattle were taken in other land, and

Judgment, when it shall be taken upon the plea, and when upon confession, (1) or *nil dicit*.
Comb. 379. S. C. Carth. 370.
S. C. 1 Salk. 173. S. C. 5 Mod. 225.
S. C. 1 Ld. Ray.

90. S. C. Holt 149. S. C. 1 Ld. Raym. 390. 2 Ld. Raym. 924. 1 Str. 397. 1 Barr. 297.
3 Rolie's Abr. 99. Cro. Eliz. 214. S. C. 1 Leon. 63. 5 Com. Dig. 186.

(1) Where the trespass is confessed the plaintiff shall have judgment, tho' a verdict be found for the defendant. *infra* p. 548.

JONES v.
BODINGHAM.

There could be
no such writ of
Hilary term, be-
cause the Queen
died on the 28th
Decem. A. D.
1694.

traverses the taking in the land where it was alledged by the defendant; and this was found for the plaintiff. And it was argued by *Northy* for the defendant, that judgment in this case ought not to go for the plaintiff upon the verdict; for the plea of the defendant, that a *capias* issued in *Hill. 6 W. & M.* is altogether void and nugatory, it being impossible that a *capias* should have issued *Hill. 6 W. & M.* inasmuch as the Queen was dead before, viz. on the 28th day of *December 1694.* and so there was no such term as *Hilary* the 6th of *William and Mary*, but *Hilary* the 6th of *William* the Third only; and whenever the plea of the defendant is altogether void, judgment shall not be entered upon the plea, but upon *nil dicit* or confession, and a writ of inquiry shall be awarded; as in an action of debt brought against an executor for 4*l.* and he pleads, that the testator was indebted to him in 40*l.* and that goods had come to his hands to the value of 10*l.* the which he retained, &c. and no other goods, &c. and the plaintiff replies, that he was executor of his own wrong, and hath other goods; & *hoc paratus est verificare*; notwithstanding the plaintiff's replication concluding with an averment is ill, (for he ought to have concluded to the country) yet he shall have his judgment upon the confession only of the defendant. *Yelv. 138. (a).* And this diversity was agreed *Cro. Eliz. 227.* Trespass for taking five horses; the defendant justifies by a custom to distrain the horse in the possession of a person amerced at the leet; issue thereupon joined, and a verdict for the plaintiff, and judgment for him; but it was reversed, for that such prescription is void, and so no judgment could be upon the verdict; it would be otherwise where the plea contained matter of bar, and issue was joined upon an immaterial point. The same diversity is taken *Mo. 867. (b)* Debt upon an obligation, *Pas. 1 Car.* the defendant pleaded a judgment against him as executor the 5th of the now King, (where it ought to have been the 5th of King *James*,) and no assets *ultra*, &c. the which is a void plea; yet it is said judgment shall be for the plaintiff, although not upon the verdict. *Cro. Car. 25. (1)* And the same distinction runs thro' all the

(a) 1 Brownl.
304, S. C.

(b) Hob. 112.
S. C.

(1) *Holt, C. J.* said, "that this case "home to the purpose." Comb. (though not clearly reported) was 380.

books;

JOHN W.
BODINGHAM.

books; if the plea of the defendant is altogether void, judgment shall go against him by confession or *nil dicit*; but where the plea of the defendant would have been a good bar, if it had been well pleaded, but is ill pleaded, and the issue thereupon is tried, there the judgment shall go upon the verdict; as where the defendant pleads concord without satisfaction, *Cro. Eliz.* 778. (a) for concord is a good bar in trespass; but it is not well pleaded without satisfaction; so in the case there cited, payment is a good plea to debt upon a single bill; but it is not a full bar without acquittance. In avowry for the penalty for destruction of deer upon the statute 13 *Car. 2. c. 10.* to which the defendant was abetting, That he did not abet is a proper plea, for it denies the very cause of action; although the defendant is estopped to plead this matter by the conviction. *Raym.* 458. and the case there cited in an action of debt upon a bond against an executor, who pleads *non est factum* generally, this is a proper bar to debt upon a bond; but the executor ought to have shewn that he denies the same deed upon which the action is founded.

(a) *Yelv. 2. S. C.*
Concord is not well pleaded without satisfaction.
Vide infra. p. 142. and the cases there cited.
Payment without acquittance is not a good plea to debt upon a single bill.
(2)
Cro. Eliz. 455. Moore 692. S. C. 5 Co. 43. a. S. C. 1 Brownl. 225. Cro. Eliz. 885. Cro. Jac. 86.

Sir *Barth. Shower* on the other side cited many cases to the same effect with that in *Cro. Eliz.* 778. and said there was no difference between them and the case at bar; for the plea at bar was in substance good, if it had been true and well pleaded; for if there was a *levari facias* awarded, and a warrant thereupon, and a taking by force of such warrant in the land of the person outlawed, this had been a good justification for the defendant. To which *Holt C. J.* and the court inclined; because the verdict being found for the plaintiff, the merit of the case appears on his side: And *Holt C. J.* thought that the diversity taken by *Northy* was not maintainable; for in ejectment, where the defendant pleaded a demise to himself for years, and that he was possessed until the lessor of the plaintiff disseised him, the plaintiff traversed the disseisin, and it was found that the plaintiff did not disseise the defendant; although the plea in that case was altogether void and impossible, yet judgment went against the defen-

(2) Such a plea is bad upon demurrer, but good after verdict. *Cro. Eliz.* 455. 2 *Str.* 1022.

JONES v.
BODINGHAM.

(a) 2 Roll. Abr.
709. pl. 39.

dant upon his plea. 2 Cro. 679. Entry without expulsion is a void plea in bar of rent, nevertheless judgment shall be given thereupon. Hob. 326. (a). And he said, that in such case judgment cannot be given upon *nil dicit*; for judgment by *nil dicit* is no more than an implied confession; but where the defendant takes upon himself to plead, and his plea is void, it shall not be intended that he says nothing to the action, for this would be to make an implied implication; but whenever the defendant has directly confessed the action, there the judgment shall be upon his confession, and not upon his bad plea. (3)

(3) In consequence of which the verdict was set aside, and judgment given for the plaintiff on the defendant's confession. Comb. 380. 1 Burr. 297.

D E

Term. Sanct. Mich.

8 Will. III. in B. R.

— and Blackall *vers.* Heal and Others.

Case 7.

TRespass. The plaintiff declares for a trespass committed on the first of *February* in the 8th of the present King, and the declaration was delivered in *Easter* term last, and issue joined upon not guilty pleaded, and a verdict was found for the plaintiff. And Sir *Bartholomew Shower* moved in arrest of judgment, for that it appears that the action was brought before the cause of action commenced; for the plaintiff declares for a trespass committed on the first of *February* in the 8th of King *William*, but the action is commenced in *Easter* term the 7th of King *William*, and the cause is tried in the 7th year of King *William*; and so damages are given for a trespass which appears by the record not to have been committed at the time of the trial. *Sed non allocatur*; for *Northy* and the Court took this diversity, that where the plaintiff hath declared for a trespass committed on a day after the filing of his declaration, and before plea pleaded, this is not aided by a verdict; for the jury has all that time in their consideration, and so may assess damages for the whole time, as well as for the day named in the declaration, which must be ill for all the time before the action commenced; for a man shall not have an action before the cause of action arises; and this was the reason of the case 2 *Saund.* 169. *Hambleton* (a) and *Vere* argued on the other side; for there an action on the case was brought because the defendant had inticed away his ap-

(1) A verdict aids a fact alleged in the declaration at a day impossible, but not a day between the declaration and the verdict.
12 Mod. 102.
S. C. Carth.
389. S. C.
2 Salk. 662. S.
C. 5 Mod. 286.
S. C. Cro. Jac.
626. 5 Bac.
Abr. 317.
5 Com. Dig. 29.
3 Salk. 8. Hob.
189.

(a) 1 Lev. 299.
S. C. Raym.
200. S. C.
2 Keb. 693.
697. S. C.
5 Com. Dig. 166. infra p. 232.

(1) "It is a rule that a verdict helps every thing which is necessary to be proved upon the trial, and without which no verdict could be given for the plaintiff." Carth. 389. 5 Com. Dig. 6c. Dougl. 3d Edit. 681. infra p. 368.
prentice,

— and BLACK-
ALL v. HEAL
and Others.

prentice, who was to serve him for nine years, which were not all expired, *per quod servitium amisit per totum residuum termini predicti, &c.* and there was a verdict for the plaintiff, and intire damages assessed, which was ill; for the plaintiff declared for the loss of the service for all the time to come, but ought to recover only for the time past; for his apprentice might return and serve the residue of his term: But in the present case the plaintiff declared of a day not yet come, which is as of no day at all; for it is impossible that the jury can give damages for a trespass committed on a day that never was; therefore of necessity it must be that the plaintiff proved in evidence a trespass committed before the action brought, otherwise he could not have had a verdict for him; and so the verdict hath aided this mistake of the day; and so it hath been adjudged before in this Court, *Pasch.*

(a) 3 Keb. 354.

24 Car. 2. *inter Shorter* (a) and ——— And now judgment was given for the plaintiff.

(b) 12 Mod.
105.

And in another case between *Wall* and *Duke* (b) this term, where the plaintiff declared upon a trespass committed *diversis diebus & vicibus*, without alledging any day; after verdict it was held to be aided by the Court.

2 Salk. 66s.
Vide stat. 17
Car. II. c. 8.
1 Mod. 37.
3 Mod. 281.
1 Leon. 187.
1 Str. 427.
1 Vent. 90.
Latch. 92.

After judgment for the plaintiff [in the principal case], it was moved by *Northy*, that Judgment should be entered of *Trinity* term; for that one of the plaintiffs had died between the last and the present term, and the act of the Court in taking advice to this term should not prejudice the party; but it was denied: For *per Holt* C. J. here is a continuance by the *curia advisare vult* over to this term, and therefore judgment shall not be entred before. (2)

(2) The following distinction is taken in 1 Mod. 37. "If there be no continuance entered, you may enter the judgment as at the day in bank; but

" if continuances are entered, then you
" cannot go back, but must enter the
" judgment to the time of the continu-
" ances."

The King *vers.* Keate, in B. R.

Case 8.

THE defendant was indicted for murder, (1) and also upon the statute 1 Jac. 1. c. 8. that takes away the clergy from him who shall stab or thrust any person that hath not then any weapon drawn, or that hath not then first stricken the party who shall so stab or thrust, &c. The jury upon *both indictments found specially, that *Keate* [the defendant] had hired one *Wells* to serve him as his gardener, and being minded to turn him out of his service, sends another of his servants to *Wells* to bid him deliver up the key of the garden, who brought back answer to his master, that *Wells* would not deliver up the key; *Keate* goes out of his parlour, fetches his sword and goes into the kitchen where *Wells* was, and interrogates him why he would not deliver up the key; *Wells* replies, that he might have it if he would; then *Keate* drew his sword and cut *Wells* on the head with it; *Wells* with a sled, *viz.* the handle of a scythe which he held in his hand, strikes at his master, but by the rack in the chimney the blow was prevented; *Wells* punches his master several times with the sled on his belly, who retires back to the middle of the kitchen towards the door; then *Keate* runs *Wells* into the left wall with the sword, whereof he died: And if the Court adjudges this to be murder, or within the statute, they find *Keate* guilty, &c.

Homicide, when it is murder.
Holt 481. S. C.
Skin. 606. S.
C. 5 Mod. 287.
S. C. 1 Ld.
Raym. 138. S.
C. Comb. 406.
S. C. 3 Salk.
191. S. C.
12 Mod. 102.
118. 1 Salk.
47. 103.
4 Blackf. Com.
176. 193.

*[14]

And it was argued by *Cowper*, King's counsel, that this was murder; and he principally insisted, that where a man kills another without sufficient provocation, it is murder; for every provocation doth not suffice to make it manslaughter. *Hale's Pleas of the Crown.*

As to the indictment upon the statute (a) 1 Jac. c. 8. he said, that if the offence were only manslaughter, it shall never-

(a) This Statute is declaratory of the common law.

C. J. Kely 55. Fost. 298. 1 Hawk. P. C. 116. 1 Hale P. C. 456.

(1) "A prisoner whose case may be brought within the letter of the act (1 Jac. c. 8.) commonly is arraigned upon two indictments, one at common law for murder, the other upon the statute." Fost. 299. 1

Hale P. C. 468. This act is continued by 3 Car. 1. c. 4 & 5. s. 22. & 16 Car. 1. c. 4. For the reason and occasion upon which it was passed, see Ld. Raym. 139. 845. Fost. 297.

thelefs

KING v.
KEATE.

thefts be within the statute of 1 Jac. the intent of which statute was to take away the benefit of the clergy from him who should kill another, who had not any sword or other arms for his defence at the time of the assault; for if he be assaulted, and afterwards strikes with a candlestick, book, or other such thing which was in his hand at the time of the assault, this shall not be a weapon drawn within the act; so the slead which *Wells* had in his hand shall not be said to be a weapon, and the strokes which he gave to his master, after the stroke given by his master with the sword, shall not be within these words [not having then first stricken]; for it is natural for any person in the apprehension of death to take any thing near at hand to defend himself from the strokes of another; then it is not to be distinguished from the case of *Vincent Byard*, reported by Sir *William Jones* 340.

Foll. 301.

[15]

4 Blackf. Com.
194.

Sir *Barth. Shower contra*. By this verdict it does not appear who struck the first stroke, for it is not said that *Keate* had struck his servant before the servant had punched his master; but if the verdict were certain, this cannot be within the statute; for the slead in the hands of the gardener was a weapon drawn within the statute; so a cudgel. *Style* 86. *Allen* 43. *Godb.* 154. And upon the other indictment it shall not be murder: True it is, that at common law all homicide or killing was capital until the statute of *Marlb.* which says, *murdram de cetero non adjudicetur coram justic' ubi infortunium tantummodo adjudical' est, sed locum habet murdram de interfectis per feloniam tantum & non iliter.* 2 *Inst.* 148. There it appears, that homicide *per infortunium* was murder; so *se defendendo*. 21 *Ed.* 3. 176. 3 *Inst.* 55. But at this time, that alone is murder which is committed *ex malitia precogitata*. 3 *Inst.* 57. *Yelv.* 105. for homicide without malice is no more than manslaughter: And it seems to me, that where there is a quarrel, there killing shall not be construed to be murder, if it be a sudden quarrel, and thereupon the parties contend, and one of them is killed, but only manslaughter; (2) but if a challenge be sent, there it shall be said

Homicide without malice is manslaughter.
4 Blackf. Com.
198.

(2) The law in this case extends "two happen to fall out upon a sudden farther, for it is decided, "that if "den, and presently agree to fight, "and

said to be murder. (a) 1 *Bulst.* 87. 3 *Bulst.* 171. if a quarrel arise at play, and one kills another, it is but manslaughter. 12 Co. 87. So where a man upon the complaint of his son, went and gave the person who struck his son a mortal stroke, it was held to be only manslaughter. (b) 2 *Gro.* 296.

KING v.
KEATE.
(a) 4 Black. C. m.
199. 1 Hawk.
P. C. 2d edit.
124. Fost. 297.
(b) 1 Hawk P.
C. 125. Fost.
294. 1 Hale's
1 Vent. 159.

P. C. 453. 12 Co. 87. 2 Ld. Ray. 1498:

Holt C. J. whether it be murder, or not, depends upon this question, viz. whether here was a sufficient provocation or not? And I am of opinion, that the refusal to deliver the key to the servant sent by *Keate* was not a sufficient provocation. Words are not a provocation: there was a case tried at the *Old Bailey*, 10 Oct. 1656 (c) *Grey* a blacksmith commanded his apprentice to work in his shop, and make such a thing in his (the master's) absence; at the return of his master, he and his apprentice went to work together at their trade, and being at work, *Grey* asked his servant whether he had made the thing ordered to be made by him in his absence? who answered, that he had not; the master said, that he would send him to *Bridewell*; the servant replied, that he chose to be in *Bridewell* rather than in his service; and upon this the master takes a bar of iron, and with it gives the apprentice a mortal stroke; and this was adjudged to be murder. I have a manuscript written by *Kelynge C. J.* of a special verdict given by the jury in this case, viz. A man pretending to be a preft-master came up to two men and preft one of them for the marine service, he who was preft went quietly with the preft-master; the other, conceiving that the preft-master had not any lawful authority, followed him, and demanded his warrant, which the preft-master shewed him, but this was not satisfactory, upon which he struck the preft-master, and gave him a mortal stroke: and by *Hale* Chief Baron, and seven other judges, this was adjudged in the exchequer to be but manslaughter; for the liberty of an *Englishman* concerns every *Englishman*; and the restraint of such liberty is a provocation to any one

Words are not
a sufficient pro-
vocation.
1 Hale P. C.
456. 4 Blackst.
Com. 200.

(c) 4. Blackst.
Com. 199. J.
Kelynge 64.
133.

[16]

If A. illegally
impresses B. and
C. in endeavour-
ing to rescue
him kills A. it
is only man-
slaughter.
J. Kely. 59. &
137. 2 Lord
Raym. 1302.
1 Hawk. P. C.
129. 1 Hale

P. C. 465. *Holt* 491. Sed vide *Fost.* 314. *Dougl.* 200. *Rex. v. Borthwick.*

“ and each of them fetch a weapon
“ and go into the field, and there one
“ kill the other, he is guilty of man-
“ slaughter only, because he did it in

VOL. I.

“ the heat of of blood.” 1 Hawk.
P. C. 124. 1 Hale. P. C. 453. 3 1st.
51. Fost. 297. 4 Blackst. Com. 191.
2 Ld. Raym. 1492.

C

that

KING v.
KEATE.

(a) Palm. 35.
2 Rolle's Rep.
320. 1 Hawk.
P. C. 107.

(b) 21 Edw. 1.
Stat. 2.

[17]
3 Ld. Raym.
1498. Comb.
407, 408.

that shall see such illegal restraint: but they agreed, that if there had not been a provocation it would have been murder. But *Kelynge*, *Twifden*, *Windham* and *Morton* held, that there was not a sufficient provocation, and for that reason that the crime was murder. As to what hath been urged in the present case, that *Keate* was punched with a sled, and retired before such time as he killed his servant; it is to be understood, that if a man assault another with malice, and afterwards is distressed, and flyeth to a wall, and then kills the other, this is murder: (a) Several persons went into *Hyde-Park* with a resolution to hunt the deer, and to kill all opponents; the keeper saw the action, and commanded them to stand; thereupon they fled, and the keeper shot after them; upon which they returned, shot the keeper, and killed him; and this was adjudged murder; for by the statute *de malefactoribus in parvis*, (b) if a person refuse to stand, upon the demand of the keeper, he may shoot at him: in the present case *Keate* was the master of *Wells*; and it is objected, that where a master gives a mortal stroke to his servant in the correction of him, it shall not be murder; as it was held in *Turner's* case: but that is where a man properly corrects a servant, and gives him by accident a mortal stroke; for so was *Turner's* case: the servant of *Turner* had refused to do something his master had ordered him; the master takes up his wife's clogg and struck the servant on the head, of which stroke he died; this was accidental, and it cannot be imagined that he intended to kill him: But a sword is an improper instrument for correction.

Palm. 545.
1 Jones 198.
5 Mod. 290.
Fost. 292.
4 Blackst. Com.
199. 1 Hale
P. C. 454.
J. Kelynge
227.

In *Holloway's* case, *Cro. Car.* 131. a park-keeper found a person in the park with a hatchet in order to cut wood, he takes him and ties him to the tail of his horse, and gives the horse two strokes, the horse ran away and killed the person; this was murder, although the keeper intended only to give him correction for his misdemeanor, but he did it in an unreasonable way; but if the verdict be uncertain, then there ought to go a *venire facias de novo*; but to me it seems certain enough. I have heard that the fact was more foul than it is found, and am not for having it tried over again. *Rokeby* and the other justices

justices gave no opinion ; for as *Rokeby* said, *De morte hominis nulla est cunctatio longa. Ideo adjournatur.* (3) KINGD.
KEATE.

(3) Some exceptions being taken to the form of the indictments, they were both quashed, and Mr. *Keate* was bailed to be tried at the next assizes, where he was found guilty of manslaughter, and had his clergy, and died of the small-pox in 1697 in *Wiltshire*, his own county. 1 *Ld. Raym.* p. 145.

The defendant in this instance appears to have been guilty of murder, and should, as was Lord *Holt's* opinion, have been convicted upon that indictment. The authorities all strongly confirm this idea. *Kelnyge* Ch. Just. in his Reports, p. 130, says, "No words of reproach or infamy are sufficient to provoke another to such a degree of anger as to strike or assault the provoking party with a sword, or to throw a bottle at him, or strike him with

any other weapon that may kill him ; but if the person provoking be thereby killed it is murder. In the assembly of the judges, 18 Car. 2. this was a point positively resolved ;" and afterwards the Chief Justice states this very case and determines it to be murder. 2 *Ld. Raym.* 1493. Upon this point consult *Fost.* p. 291. 1 *Hawk. P. C.* p. 124. f. 33. and the cases there cited. Upon the second indictment the defendant appears to have been properly acquitted, as it seems now to be the better opinion, that if the deceased had struck at all before the mortal blow given, this takes it out of the statute, though in the preceding quarrel the stabber had given the first blow. *Fost.* p. 301. 1 *Hawk. P. C.* p. 116. f. 6. 4 *Bl. Com.* p. 193.

Truelock *vers.* ———.

Case 9.

DE B T. The plaintiff sets forth, that letters of administration were committed by the official of the dean, who had a peculiar lawfully constituted, but does not shew how he was intitled, as it ought to be done in the case of a peculiar. *Cro. Eliz.* 791. Neither doth he say, that the granting administration *ad tunc pertinuit* to the dean: and for these causes the defendant demurred. *Sed non allocatur* ; in as much as the plaintiff has set forth that administration was granted by the official of the dean, to whom right of granting administration, &c. belonged, it is sufficient.

Grant of administration when well pleaded.
12 *Mod.* 100.
S. C. 1 *Shew.* 355. *Skin.* 551.
1 *Salk.* 40. *Cro. Eliz.* 102.
Plowd. 277. *Cro. Jac.* 556. *Palm.* 97. 2 *Mod.* 65. 4 *Mod.* 133. 6 *Mod.* 231. 1 *Ld. Raym.* 635. *Gibb. Cod.* 978.

Barton, Administratrix of William Dobson,
vers. Fuller. In B. R.

[18]

Case 10.

TH E plaintiff's declaration was of *Michaelmas* term the 7th of king *William*, and sets forth, that letters of ad-

If letters of administration are lost, new letters of administration

tion may be granted after an action brought. ministration

BARTON v.
FULLER.

Hob. 245.
2 Lev. 197.

ministration were granted on the 11th of *January* 7th of king *William*, which is after the action commenced. The Court said, if administration be granted, and the letters of administration are lost, new letters of administration may well be granted after the action is commenced; but it is otherwise if they are then originally granted.

Case II.

Johnson *versus* Lee. In B. R.

(1) Prohibition to spiritual court, when granted for fees there. 5 Mod. 238. S. C. Skin. 589. S. C. Holt. 656. S. C. 1 Salk. 333. 1 Ray. 703. S. C. Holt. 596. S. C. 12 Mod. 618. S. C. 3 Keb. 441. 516. 2 Gibb. Cod. 1015. 2 Burn's Ec. Law. 239. 1 Vent. 165. 4 Mod. 254. 2 Keb. 810. Bunb. 170. 4 Bac. Abr. 256. 4 Com. Dig. 494. (a) Hob. 16. Cro. Car. 162. 339. Cro Jac. 321. 1 Burn's Ec. Law. 55. 2 Gibb. Cod. 1035.

A Prohibition was prayed, upon suggestion of the statute of 23 H. 8. c. 9. by which it is enacted, that none be cited out of his diocese: that the plaintiff was resident at *Hungerford* in the county of *Berks*, within the peculiar jurisdiction of the dean of *Sarum*, and that the defendant had cited him to the Court of Arches for fees expended in the Spiritual Court, which are the customary fees. The defendant shewed, that the dean of *Sarum* requested the dean of the Arches, &c. *Northey* argued, that the suit out of the diocese was ill; for the request of the dean of the Arches, upon which the defendant relied, ought to have been made to the next superior, who was the bishop. (a) *Hob.* 186. 1 *Sid.* 90. 2 *Roll. Rep.* 446, 448. Secondly, The suit ought not to have been in the Spiritual Court for fees; for demands *pro opere & labore* are properly determinable at common law; and in this case the law implies a promise in the retainer. If it should be objected, that this court hath not cognisance of fees in the Spiritual Court, by the same reason it may be said, that no action shall be brought here for fees in a court of equity. But the defendant says, that the fees demanded are customary fees due time out of memory; if so, it may be proved in evidence; and although suits here are not frequent for proctors' fees, yet it makes nothing against us, for suits for them are in general terms, *pro opere & labore*. *Vide* 2 *Roll. Rep.* 59. 1 *Mod. Rep.*

[19]

(1) It was laid down in the case of *Horton and Wilson*, "That no Court can better judge of the fees that have been due and usual in the Spiritual Court than themselves, and that therefore the suit for fees was most proper

for that court, unless where the foundation of the demand should be custom, and it should come in question whether the custom was so or not." 1 *Mod.* 167.

167. (a) where a prohibition was granted for a suit in the Spiritual Court; the like 27 Car. 2. (b) by Hale C. J. upon a motion. (2)

JOHNSON v.
LEX.

(a) 1 Keb. 203.

1 Freem. 129.

(b) 3 Keb. 516.

Sir Barth. Shower was on the other side; and he said, that the dean of Sarum had independant jurisdiction, and therefore his request to the dean of the Arches was good. Secondly, fees are necessary in all suits, and whoever hath cognizance of a suit, may have it of the fees incident thereunto: The Spiritual Court shall always determine incidents; Mar. 45. shall have cognizance of a way to a church, of seats in the church; so if A. is indebted to B. in 5 l. and bequeaths so much to B. the Spiritual Court shall determine of both. Holt C. J. A dean, *quatenus* dean, has no jurisdiction; but as he hath a peculiar he is exempt from the ordinary, for that is the import of a peculiar. Then the principal question is, whether a suit in the Spiritual Court shall be brought for fees? It is granted, that a suit may be commenced for them at common law, fees cannot be settled by the canon law, but they [the Spiritual Court] give costs and expences of suit; but debt doth not lie for such costs at common law. Rokeby J. cited a case between Goffin and Froggat, churchwardens of the church of D. in Staffordshire, (c) and ——— in C. B. where at a visitation of the arch-deacon, a presentment was made (amongst others) for register's fees, and after several motions a prohibition was granted, and then the matter was compounded. (3)

(c) 1 Salk. 330.
This case is known by the name of Goffin v. Ellison.

(2) Hale C. J. said in this case, "That no action upon the case was ever brought for such (*i. e.* proctors') fees, and that therefore they may be sued for in the Spiritual Court."

(3) It is said that after several motions a prohibition was granted. Gibb. Cod. 1015.

Lately *vers.* Fry. In B. R.

Case 12.

TRESPASS *quare clausum fregit & blada sua ibidem crescent succidit & asportavit.* The jury, as to the breaking of the close and cutting of the corn in the blade, found the

Costs when given upon the Statute 22 & 23 Car. 2. Skinn. 666. S. C. 1 Salk. 193.

S. C. 5 Mod. 315. S. C. Comb. 399. S. C. 420. Carth. 224. 2 Vent. 48. 180. 195. 215. 1 Strange 192. 2 Mod. 141. 3 Burr. 1282. 1 Freem. 214. 366. 374. 391. Doug. 780. 2 Blackst. 11513 Coram Rep. 133. 391. Bull. Ni. Pri. Edit. 1790. p. 329. 330.

C 3

defendant

LATELY v.
FAY.

defendant guilty, but as to the carrying away not guilty. And it was moved by *Gould*, serjeant, for full costs, (for the damages given by the jury were no more than 10 s. and by the statute (1) 22 & 23 Car. 2. c. 9. the plaintiff shall have no more costs than damages): And it was urged that this statute was intended for small trespasses, as *pedibus ambulando*, &c. but here the corn is cut down in the blade, which is a great destruction. And *Rokeby* J. said, if a man enters my garden and cuts down my trees, for which perhaps the jury gives but small damages, although I suffer a great inconvenience, it would be very mischievous if I should lose my costs. But after several debates the Court inclined to be of opinion, that if any thing had been carried away, full costs should have been given; for the carrying away of any cattle is without the act of parliament. *Vide* 2 Vent. 48. where if a man enters claiming title, there shall be full costs given; but where it doth not appear that the trespass was committed under pretence of title, or that any thing was carried away, there we cannot make a construction contrary to the express words of the act of parliament.

[20]

When the title comes in question, or any thing is carried away, full costs shall be given.

Skin. 100.

Raym. 487.

3 *Mod.* 39.

2 *Ld. Raym.*

76. 2 *Lev.*

234. 2 *Ld.*

Raym. 1444.

2 *Str.* 726 *S.C.*

1 *Salk.* 208.

3 *Keb.* 184. 247. *Gilb. C. P.* 263. 2 *Jones* 282. *Gilb. Eq. Ca.* 195. *Say. Law of Costs.* c. iv.

p. 27. 1 *Bac. Abr.* 512. and the cases there cited. 2 *Com. Dig.* 545. and the cases there cited.

(1) This statute, as far as it relates to wilful and malicious trespasses, is aided by 8 and 9 Will. 3. c. 11.

In the House of Lords, the 13th of Case 13.
January, 1697.

Between { *Sir Evan Loyd, Bart. and Mary his*
 Wife, Sidney Godolphin, and Susan his
 Wife, Appellants,
 { *Sir Richard Carew, Baronet, and Char-*
 les Tremain, Respondents.

THE case was this: *Rice Tanat*, Esq. was seized of several lands in the counties of *Salop*, *Montgomery*, and *Denbigh*, and dying left issue *Mary*, *Penelope* and *Susan*, his daughters and coheirs.

Proviso in a deed for the conveyance of an estate for a certain sum; if such be found die without

issue, held good, notwithstanding a fine levied by them, where the uses were declared otherwise. Vin. Abr. Tit. Fine (Z) pl. 18. Show. P. C. 137. S. C. Chan. Prec. 72 S. C. Cro. Eliz. 688. 1 Cruise on Fines 270. Cro. Jac. 591. Fearn's Con. Rem. 4th edit. 414. 1 Str. 429.

By lease and release of the 24th and 25th of July 1674, upon the marriage of *Penelope* with *Sir Richard Carew*, in consideration of 4000 *l.* paid by him to *Mary*, they the said *Mary* and *Penelope* convey two parts of the lands aforesaid to trustees, in trust for *Sir Richard Carew* for life, and afterwards for *Penelope* for life, and afterwards to the issue of their two bodies, &c. remainder to *Sir Richard Carew* and his heirs; with a proviso, that if it should happen that no issue of the said *Sir Richard Carew*, on the body of the said *Penelope*, should be living at the decease of the survivor of them, the said *Sir Richard Carew* and *Penelope*, and the heirs of *Penelope* should, within twelve months after the decease of *Sir Richard Carew* and *Penelope* without issue as aforesaid, pay to the heirs or assigns of the said *Sir Richard Carew* 4000 *l.* then the remainders and trusts for the said *Sir Richard Carew* and his heirs should cease and be void, and the fee-simple of the said premises should be to the right heirs of the said *Penelope* for ever. *Mary* afterwards was married to *Sir Evan Lloyd*, and *Susan* to *Sidney Godolphin*.

[21]

LORD and
others v.
CAREW and
others.

Sir *Richard Carew* and *Penelope* his wife levy a fine of the land in *Com' Salop* to the use of Sir *Richard* and his heirs, and afterwards die without issue; and the appellants, as heirs of *Penelope*, exhibited their bill in chancery against *Charles Tremain*, the surviving trustee, and Sir *Richard Carew* devisee of Sir *Richard* the husband of *Penelope*, to have a conveyance of the premises to them and their heirs, upon payment of 4000*l.* pursuant to the proviso. But the bill was dismissed by the Lord Chancellor *Sommers* 6 Nov. 1697, under pretence that this proviso tended to a perpetuity.

Proc. in Chan.
106.

And now upon the appeal to the Lords the decree for the dismissal was reversed, after hearing of the Judges and a long argument; and afterwards by order 24 *Mar.* it was added to the decretal order, that on payment of 4000 *l.* to Sir *Richard Carew*, or into the court of chancery for his issue, the appellants, as heirs of *Penelope*, should be let into possession of the premises in question.

D E

Term. Sanct. Hill.

8 Will. III. in B. R.

Gale *vers.* Ewer.

Case 14.

A Prohibition was moved for to the consistory court of London, where *Ewer* the rector of *Ingatestone* libelled for refusing to set out tithes, or if they were set out, such setting out or severance was in the absence of, and without giving notice to the rector, and also that the plaintiff after severance, without notice to the rector, took the nine parts, and turned his cattle into the meadows where the tithes were, who destroyed and consumed the tithes: and upon a suggestion that by the statute 2 *Ed. 6. cap. 13.* all the king's subjects ought justly to set out their tithes, &c. and that the plaintiff had separated them from the other nine parts; and whereas the exposition of all statutes belongeth to the temporal judges; and whereas tithes divided from the nine parts are lay chattels, and a suit for trespass, &c. is merely temporal, &c. this motion was made.

Turning of cattle into tithes makes it a fraudulent severance. 12 *Mod.* 117. S. C. 1 *Ld. Raym.* 189. 3 *Burn's Ec. Law* 478. *Vin. Abr.* Tit. *Dismes* (2) pl. 19.

And first it was urged, that the spiritual court ought not to proceed for refusing to set out tithes, but for the subtraction of them only: for by the statute 2 *Ed. 6. c. 13.* it is enacted, that if any person do subtract or withdraw any manner of tithes, &c. the party so subtracting or withdrawing the same may or shall be convented or sued in the King's Ecclesiastical Court,

GALE W.
EWER.

[23]

Court, &c. And the clause which gives the suit in the Spiritual Court for the double value says, if any person carry away his corn before the tithe thereof set forth, &c. so that the suit in the Spiritual Court ought to be for the subtraction only, and not for refusing to set the tithe out: the clause which provides, that all the King's subjects shall duly set out their tithes, gives the penalty of treble value, but the remedy is by action of debt in the Temporal Courts. This clause for the setting out of tithes is introductive of a new law, as appears by 2 *Inst.* 649, and by consequence the exposition thereof appertaineth to the Temporal Courts, which ought to judge whether the tithes were duly and without fraud severed and divided; for the manner of tithing ought not to be governed by the canon or civil law.

A prohibition was granted *Trin. 1 W. & M.* upon a suggestion, that tithes were set out. 2 *Vent.* 48. But in the present case the Court did not incline to do so: for the clause which gives double value for carrying away corn, &c. before tithes set out, gives the Spiritual Court cognizance for refusing to set out tithes. 2 *Roll. Abr.* 299. l. 15.

It is not necessary by the common law to give notice of the setting out of tithes. *Comb.* 128. 3 *Burn's Ec. Law* 475. *Degge's P. Coun.* 220. *Corth.* 142. 3 *Burr.* 1893. 3 *Com. Dig.* 103.

2^{dly}, It was urged, that the Spiritual Court ought not to proceed for the setting out of tithes without (1) notice given to the rector; for although the ecclesiastical law requires notice to the parson when the tithes are severed, yet the common law requires no such thing; as *Hutton* saith it has been adjudged. *Noy* 19. The statute 2 *Ed. 6. c. 13.* says only, it shall be lawful for every party to whom any of the said tithes ought to be paid, &c. to view and see the said tithes to be justly and truly set forth, and the same quietly to take and carry away, &c. and altho' it be that as to the taking and carrying, this statute is declaratory, yet as to the view, it is introductory of a new law; as it appears 2 *Inst.* 650. And the penning of this act is, that it shall be lawful to view, &c. which shews the intent of the legislature was not, that the parishioners should give notice thereof; and that no notice is

(1) A custom however to give notice was held good in the case of *Butter v. Heatbby.* 3 *Burr.* 1891.

necessary

necessary hath been oftentimes adjudged: thus 13 Car. 1. between *Chafe* and *Ware*, in this court, and afterwards affirmed in error. *Style* 342. 1 *Rol. Abr.* 643. l. 30. So also *Trin.* 1 *W. & M.* 2 *Vent.* 48.

GALE V.
EWER.

And of the same opinion was the Court in the present case; and a prohibition was granted as to the suit for not giving notice of setting out the tithe. It was urged on the other side, that this matter ought to have been pleaded in the Spiritual Court. But *Holt* C. J. answered to that, there was no necessity that it should be so pleaded; forasmuch as it appears upon the face of the libel, that the suit was for setting out tithes without giving notice; it would have been otherwise if the suit had been for refusing to set out tithes. The plea, that the tithes were severed, is no good cause for a prohibition unless they refuse that plea for want of notice given of the severance. But *Holt* C. J. thought the turning of cattle to the tithe made it a fraudulent severance, and that a suit might be maintained for it in the Spiritual Court.

[24]

The King *vers.* Clerk. In B. R.

Case 15.

AN *habeas corpus* was brought for the defendant, who was committed for his refusal to come upon the livery in the Vintners' Company of London. The custom was returned, that if any member refused to take the livery, &c. the Court of Assistants might commit him to the officers of the city; that *Clerk* refused, and was committed to the keeper of *Newgate*, but it was not said, that he was an officer of the city; and for this cause the return was ill: for the return ought to shew that the custom was pursued; and the best pursuit is for the court judicially to commit him to the sheriffs, (a) who are the officers of the city; therefore the defendant was discharged. But the Court held the custom to be good; and they thought, that as there was mention of a warrant in writing, such warrant ought to be returned *in hac verba*.

A custom to commit for refusing to come upon the livery in the Vintners' Company held good. *Holt*. 430 S.C. Comb. 411. S. C. 1 *Salk.* 349. S. C. 3 *Salk.* 92. S. C. 5 *Mod.* 156. 339. S. C. 12 *Mod.* 113. S. C. *Raym.* 446. 1 *Mod.* 10. 2 *Keb.* 555. S. C. 1 *Com. Dig.* 616. 1 *Bac. Abr.* 571. (a) 12 *Mod.* 75.

Case 16.

Uphare *vers.* Aidee. In B. R.

A coachman
not liable for
the loss of goods
for the carriage
of which he is
not paid, other-
wise if he is
paid. 2 Show.
128. 1 Salk.
282. Holt
130. S. C.
Skinn. 625.
S. C. 1 Com.
Dig. 212, 213.
8 Bac. Abr. 343.

ACTION upon the case brought against a hackney-coachman; and the plaintiff declared upon the custom of the realm as against a common carrier. The case upon evidence appeared to be this: a person had taken the hackney-coach, and had delivered his goods to the coachman to be carried with him, but in the passage the goods were lost; and whether the coachman should be charged for them without an express contract was the question.

Vin. Abr. Tit. *Actions*, (c. 2.) pl. 5.

And by *Holt, C. J.* at a trial at *Guiddhall*, it was held, that a passenger shall not charge a hackney-coachman for goods which he carries with him, if he does not give any thing for the carriage of them; but if he pays for the carriage, then he may charge the carrier; and in the present case there was no express contract for the carriage, but by the custom and usage of stages every passenger uses to pay for the carriage of goods above such a weight, there the coachman shall be charged for the loss of goods beyond such a weight.

Case 17.

Anonymous. In B. R. (1)

Where scandalous words are spoken of the function of a spiritual person, a prohibition shall not go. 12 Mod. 104. S. C. Holt. 593. S. C. 12 Mod. 231. 1 Ld. Raym. 423. S. C. 2 Salk. 692. S. C. 4 Com. Dig. 508. 1 Ld. Raym. 236. 2 Gibb. Cod. 1025. *Infra*. p. 309.

A Prohibition was prayed to the Spiritual Court, where the dean of — had libell'd for these words, *you are a knave, a knave, a knave indeed.* 2 Rol. 297. Godb. 447. And it was urged by *Selby* for a consultation, that these words of a spiritual person are defamatory, and a libel may be maintained in the Spiritual Court for them; and he cited

(1) This case in *Holt* and *Twelfth Modern* is styled *Nelson v. Hawkins, Dean of Chichester*.

2 Vent. 2. and a case there cited, where a prohibition was denied for these words, *Sir Priest you are a knave. Sed non allocatur*; for by Holt C. J. where the words are spoken of the functions of a spiritual person, or charge him with falsity in that function, a prohibition lies not; but for these words, where there is no relation to the function, a prohibition shall go; and after several debates it was granted. ANONYMOUS.

D E

Termino Pasch.

9 Will. III. in B. R.

Bennett *vers.* Thalbois.

Case 18.

A clothier is within the statute (1) and comprehended under the words *inferior tradesman*.

1 L. Raym. 149. S. C. Holt 661.

S. C. Comb. 420. S. C. Carth. 382. S. C. 1 Salk. 213. S. C. 5 Mod. 307. S. C. 12 Mod. 121. S. C. Barnes 125. 2 Will. 70. Say. Law of Costs. p. 54. 2 Com. Dig. 347. 4 Com. Dig. 80. 90. 4 Bac. Abr. 96.

TRESPASS *Quare clausum fregit nec non venatus est, &c. existente inferiore artifice, Anglice an inferior tradesman, scilicet pannario, Anglice a clothier; & alia enormia, &c. to the damage of the plaintiff, &c. ac contra formam statuti, &c. (1)*

Where an action lies against the defendant at common law, the words *contra formam statuti* in the declaration, shall be rejected as surplusage.

And after a verdict for the plaintiff, and 2 *d.* damages, it was moved in arrest of judgment for preventing of costs, that the plaintiff had founded his action upon the statute, but had not pursued the statute; for it is said that the plaintiff being a clothier *venatus est*, but a clothier is one of the principal tradesmen of the kingdom, and cannot be comprehended within the words *inferior tradesman*. *Sed non allocatur*; for the statute seems to prohibit all trades; but if this case were without the statute, yet an action lies against the defendant at common law; and the words *contra formam statuti* shall be rejected; as in the case between *Ward* and *Rich*, in an action brought for taking away a man's wife, and detaining her *quousque, &c.* the plaintiff concluded *contra formam statuti*, which

(1) 4 & 5 W. and M. c. 23. f. 10.
"Now this clause is a repeal of the statute 22 and 23 Car. 2. which gives

no more costs than damages." As to the matter of costs. 5 Mod. 308.

words were rejected, for there was no statute in the case. 1 Vent. 103. So in an indictment against three (a), it was set forth that one stabb'd, &c. and the others were present and assisting, and the conclusion was *contra formam statuti*, where one only was within the statute, and the others indictable at common law; and it was held that the words *contra formam statuti* should be restrained to one, and should not be extended to the others. And although it was objected that in the present case there was a statute *contra venantes*, upon which this action was founded; and therefore it came not within the reason of the first case where there was no statute; and that this action was founded upon a statute, but the statute was misrecited, which made the case different from that of an indictment, where the statute of stabbing was well recited; and so the words *contra formam statuti* properly restrainable from it; yet judgment was given for the plaintiff *per totam curiam*.

BENNETT v.
THALSOIS.

(a) Aleyn 43.
1 Com. Dig.
226.

[27]

The King *vers.* Thorp and Others. In B. R. Case 19.

INformation that the defendants *maliciose, &c. procurarunt filium & heredem decedere de domo patris sui*, and then *persuaserunt compulserunt & procuraverunt* him to be made drunk, and so inveigled him to marriage, &c. *Northey* argued that no such information lieth, for a father hath no action against a person for persuading his son to marry. *Cro. Eliz.* 55. 1 *Leon.* 50. S. C. And marriage is an honourable state, and for that reason it is no offence to persuade any one to enter into it; so it is no offence to the King to persuade the son of any person to depart from his father, without a special allegation in what manner, and an information never was maintained before for a matter of such a nature. *Wright*, Serjeant, *contra*. Here is a great offence; for if a man hath his son and heir inveigled into a marriage with a woman of ill fame, by such wrongful ways his family is ruined without possibility of reparation. And afterwards in *Mich.* term 9 *W.* 3. it was argued by *Williams* of *Grays-Inn*, that an information lay not; for the information supposeth that the infant married was under the age of eighteen years; and yet it is possible he may be above the age of fourteen

An information against defendants for maliciously conspiring together and inveigling a young man, heir to a considerable fortune, into a disgraceful marriage.

Holt 333. S. C.
5 Mod. 221. S. C.
Cumb. 456. S. C.
Carth. 384. S. C.
2 Keb. 432.
3 Keb. 101.
Cio. Car. 557.
1 Lev. 257.
1 Sid. 387.
Raym. 259.
7 Mod. 39.

fourteen

The KING v.
THORP and
others.

[28]

fourteen years, which is the age of discretion, at which a man may contract marriage; or perhaps he may be under the age of fourteen years. If it be intended that the infant was above that age, then is he enabled to contract matrimony, and it is lawful for him to do it; so then to persuade him to that which it is lawful for him to do, is no offence; the accessory cannot be guilty where the principal is innocent; and this cannot be by reason of the law of nature, that the son is under ward of the father; for if it were so, the younger son would be also under his ward. But the father can have no action but only *quare filium & heredem rapuit*; but this is by our law which gives the guardianship until the age of fourteen years; and if the heir was under the age of fourteen years, then the marriage is voidable, and so no prejudice. *Darnal*, Serjeant, on the other side insisted, that the father shall have the guardianship of the son until the age of twenty-one by the law of nature; and that such an inveiglement is an offence although the father had not his action for it, &c.

Holt, C. J. told *Williams* that his last point destroyed the foundation of his first; for in the first he urged that the son at the age of fourteen years had power to contract marriage, and for that reason the persuading him to do it, was no offence; and in the second, that such persuading is not an offence under the age of fourteen years, for that he hath then no power to contract; but he said that marriage under the age of fourteen years is good if it is not disagreed unto. And *Holt* said that the father is (1) guardian to the son until the age of twenty-one years by our law which is founded upon the law of nature; but our law gives remedy only in the case of an eldest son, by reason that it makes provision only for him. (2)

(1) A father continues guardian to his son 'till he arrives at the age of 21 years, in respect to his person but not to his lands. Co. Litt. 84.

(2) No judgment was given in this case, and I have been unable to discover how the matter was concluded.

D E

Term. Sanct. Trin.

9 Will. III. In B. R.

Jones *vers.* Mosely. *Tr.* 4 *Jac.* 2. *rot.* 176. Case 20.
By the Name of Jones *vers.* Morley.

UPON a special verdict the case was to this effect : baron and feme seised in fee in right of the feme, by indenture dated the 29th of *January* covenant to levy a fine of the lands of the feme within *Hilary* term next ensuing; and afterwards by another indenture dated the 31st day of *January*, between the baron of the one part and the feme of the other, it was covenanted, concluded and agreed, that all former contracts, covenants and agreements between them should be void, until such monies according to their marriage settlement should be paid, and then should be in force. The fine was acknowledged before the 29th of *January*, and passed the king's silver the same *Hilary* term, but after the 31st of *January*; and whether this fine should *enure* to the uses limited by the deed of the 29th of *January*, or not, was the question in this case between the heir of the baron and the heir of the feme? And it was argued by *Bannister* for the plaintiff, and Sir *Bar. Shower* for the defendant. And after argument *Holt* C. J. seemed of opinion, that this deed between the baron and feme was a void deed; for, (*says* he) it was of no effect to bind the baron, by reason that he cannot covenant with his wife; but if there were no other deed upon which the uses of the fine might arise, this might have been sufficient for declaring the uses of the fine; but here is another deed

Deeds to lead the uses of fines. [This case is more fully reported in the books quoted below.]
Carth. 410. S. C.
Comb. 429.
S. C. Holt 321.
S. C. 4 Mod. 261. S. C.
12 Mod. 159.
S. C. Show.
P. C. 140. S. C.
1 Ld. Raym.
227. S. C.
2 Salk. 677. S. C.
Vide infra p. 47.

Infra p. 334.
Co. Litt. 112. a.

JONES v.
MOSELEY.

A fine cannot be averred to other uses than those which are expressed in an indenture precedent to declare the uses, otherwise if the indenture be subsequent.
(a) 9 Co. 10. a.

dated the 29th of *January* which does declare the uses: true it is, that this fine varies in the circumstance of time, for it is said in the indenture of the 29th of *January*, that the fine shall be levied in *Hilary* term next, and the fine was really levied of *Hilary* term then present; for that indenture is dated within *Hilary* term; and altho' a fine cannot be averred to other uses than those which are expressed in an indenture precedent to declare the uses, (otherwise if the indenture be subsequent, (a) 9 Co. *Downham's* case,) yet if the fine vary in any circumstance of time, place, or quantity of acres, it might, before the statute 29 *Car. 2. cap. 3.* be averred to other uses; or if there were two deeds to declare the uses of a fine afterwards levied, the last deed shall be that upon which the uses shall arise; then it is to be considered, whether the deed of the 31st of *January* can raise the uses of this fine? And I think it cannot. *Vide infra Jones* vers. *Moseley.* (b)

(b) *Infra* p. 47.

D E

Term. Sanct. Mich.

9 Will. III. In B. R.

Anonymous.

Case 21.

THE case was this; a feme sole recovered and had judgment in debt upon a bond, and afterwards married; and the husband and wife sue out a *scire facias* upon this judgment, and have execution awarded; but before execution had the baron dies, and his executors sue out execution. Sir *Barth. Shower* urged, that the *scire facias* brought by the executor of the baron lieth not, for the debt was not vested in the husband by the award of execution on the *scire facias* brought by him and his wife. If a man takes a wife to whom *ſ. ſ.* is bound in an obligation, and the husband and wife sue the obligor and get judgment, and the wife dies, the debt is vested in the husband; for that, which was before a chose in action, *transit in rem judicatam*, &c. and is of another nature from what it was before the coverture; but a chose in action shall never vest in the husband by the coverture, if he does not gain the actual possession of it, or at least alters it so that it be no longer a chose in action: (a) And it is for this reason that, where husband and wife have judgement upon a bond made to the wife *dum sola*, the chose in action is altered, and no action lieth afterwards upon the bond, but debt must be brought upon the judgment; but where husband and wife have execution awarded in *scire facias* upon a judgment, they may afterwards bring debt upon the same judgment, but they never can have debt on the judgment in *scire facias*, the *scire facias*

A *scire facias* was brought by baron and feme upon a judgment recovered by the feme while sole, and after execution awarded the husband dies, a right is attached in the wife.
 1 Vern. 396.
 3 Atk. 211.
 1 Com. Dig. 557.
 Holt 101.
 Skin. 682. S. C.
 1 Eq. Ca. Abr. 68.
 2 Freem. 172.
 1 Ch. Rep. 235.
 1 Ch. Cal. 27.
 and the cases there cited.

(a) Co. Litt.
 351. b.

ANONYMOUS.

2 Ld. Raym.
1048.
S. P. Wms. 148.

is no more than a writ of execution; for at common law, if the plaintiff did not sue out execution within the year, he could not do it afterwards, but ought to bring his action of debt upon the judgment. And therefore the statute of *Westminster 2. cap. 18.* gives the *scire facias*, which is but a writ to have execution after the year, if the party had nothing to say to the contrary; and for this reason, if execution be awarded in the *scire facias*, it does not alter the nature of the thing upon which the *scire facias* is brought; if a *scire facias* is brought upon a recognisance, and execution is awarded, there may be another *scire facias* upon the same recognisance. And this case is different from that between *Obrian and Thomas*, (a) adjudged in *B. R.* (1)

(a) Comb. 103.
Holt 97. S. C.
3 Mod. 186. S. C. 170. with the pleadings. Carth. 30. S. C.

2 Ld. Raym.
1050. 1 Com.
Dig. 577.
2 Bac. Abr. 293.
2 Lutw. 671.
2 Keb. 223.
225. 238.
1 Sid. 337 S. C.
1 Rolle's Abr.
351. G. 5.

There a *scire facias* was brought against the husband and wife upon a judgment against the wife *dum sola*, and execution awarded against them; and afterwards the wife died, and the husband remained charged, for the words were *quod habeat executionem versus eos*. But *Holt, C. J.* said that he did not see any difference, for that judgment in the *scire facias* was against husband and wife for a debt owing by the wife, and upon the death of the wife the charge survived to the husband. And so in the present case, as the husband and wife have judgment in *scire facias* for a debt due to the wife, the benefit thereof survives to the husband, for the judgment is joint, and for that reason it shall survive; (b) if the husband outlives the wife, he shall have the benefit of it; if the wife outlives the husband, she shall have the same benefit. *Rokeby, J.* doubted, because the nature of the debt in the present case is not altered.

(b) Comb. 455.
Carth. 415. S.
C. 1 Salk. 116.
3 Salk. 63. S.
C. 1 Com. Dig.
555. 576.
2 Bac. Abr.
293. 4 Bac.
Abr. 420. Holt 101. Skin. 682. S. C. Cro. Car. 208.

(1) This case is known by the name of *Obrian versus Ram*:

Turberville *vers.* Stamp. In B. R.

Case 22.

AN action on the case, founded upon the general custom of the realm, against the defendant, for negligently keeping his fire; and the plaintiff declared that the defendant in his close did light up a fire to burn the stubble, & *ignem suum tam improvide & negligenter custodivit quod * defectu debite custodie ignis sui pred'* the clothes of the plaintiff, in the close adjoining were burnt. After a verdict for the plaintiff, Gould Serjeant moved in arrest of judgment, for that this action lay not, neither for the matter of it, nor for the manner; for an action lieth not on account of a fire lighted up in a close, but only for fire in a house, for there a man must take care of his fire at his own peril, and it may properly be said to be his own fire, but out of his house it cannot be said to be his fire, and where it is not his fire an action will not lie, as it seems. 2 H. 4. 18. a. but if an action would lie for the matter, yet in the present case it is ill brought, for the plaintiff ought to have declared that the defendant *exarsit vel ardebat* his clothes, and not to have declared upon the general custom of the realm. *Northey contra*: an action lieth as well where the fire is lighted in the close as in the house of the defendant; an action was maintained lately for fire in the woodstack of the defendant; and then the declaration is well enough, for the plaintiff says that by the improvident keeping of the fire the clothes of the plaintiff were burnt, which is now found by the verdict. Holt, C. J. the only question is, whether the plaintiff ought not to have shewn a special negligence in the defendant.

An action upon the case lies for negligently keeping fire in defendant's close, by which the plaintiff was damaged. Skin. 681. S.C. 2 Salk. 13. S.C. 1 Ld. Raym. 264. S.C. Carth. 425. S.C. Comb. 459. S.C. Holt. 9. S.C. 12 Mod. 151. S.C. Ray. Ent. 250. Old. Ent. 219. Rast. Ent. 8. 1 Mod. Ent. 227. 1 Com. Dig. 209.

[* 33]

The case was afterwards adjudged in favour of the plaintiff by the whole court; for the action is as well for a fire kindled in the fields of the defendant as in his house, for it is the defendant's fire and kindled in his ground, and he ought to have the same care of a fire which he kindles in his field as of that which is made in his house, for the duty to take care of both is founded upon this maxim, *sic utere tuo ut non ledas alienum*; but if the fire of the defendant by inevitable accident,

1 Com. Dig. 209. 12 Mod. 152.

**TURBEVILLE
v.
STAMP.**

by impetuous and sudden winds, and without the negligence of the defendant or his servants, (for whom he ought to be answerable) did set fire to the clothes of the plaintiff in his ground adjoining; the defendant shall have the advantage of this in evidence, and ought to be found not guilty. But here the verdict hath found negligence in the defendant. Therefore judgment for the plaintiff. (1)

(1) *Quære*, whether the present case *sec. 6.* made perpetual by the *st. 12* is within the *reason*, it not being with- *Ann. cap. 14. sect. 1.*
in the words of the *st. 6 Ann. cap. 31.*

Case 23.

[34]

Sutton *vers.* Moody. In B. R.

When a person
may be said to
have a property
in what is
called *feræ
naturæ*.

T Respase *quare clausum fregit & in clauso suo præd^o venatus
fuit & cuniculos suos ibidem invenit cepit & assortavit,
&c.*

1 *Ld. Raym.* 250. *Cro. Jac.* 195. *Yelv.* 104. 1 *Brownl.* 208. *S. C.* 3 *Lev.* 227. 3 *Salk.* 292.
S. C. *W. Jon.* 440. 2 *Bac. Abr.* 613. 5 *Com. Dig.* 352.

After a verdict for the plaintiff, it was moved in arrest of judgment by Serjeant *Gould*, for that the declaration was ill, for there it was said *cuniculos suos*, whereas a man cannot have a property in conies; *sed non allocatur*; for by *Holt*, C. J. he hath a property in them whilst they are in his own ground. If a man start a hare in his own ground and course it to the close of another person, and there takes it, the hare belongs to the owner of the ground where it was first started; but if it was started in the close of another man and there killed, it is the hare of the owner of the close where it was killed; but if the hare starts in another man's ground and is coursed out of it, it is the hare of the captor, for the property rests in the owner of the soil, *ratione loci*; but if she runs beyond his [the captor's] ground (being *feræ naturæ*) he loseth his property; thus during the time they are in his soil the plaintiff may call them his conies; and it is the same thing where conies are in a warren or deer in a park, as where they are in a man's field or close; for warrens and parks are privileges, but do not give any property. In the present case the plaintiff declares, *quare clau-*

A man has a
property in ani-
mals which are
feræ naturæ
found on his land
ratione loci.
1 *Salk.* 556. 3
Salk. 290. 5
Mod. 375. *S. C.*
12 *Mod.* 144.
145. *S. C.*
1 *Vent.* 122.
6 *Mod.* 183.
5 *Co.* 104. *b.*
2 *Black. Com.*
419. *Godb.*
123. *Cro. Gar.*
553. *Holt.* 16.
18. 608. *Comb.*
658. *S. C.*

sum

sum fregit & cuniculos suos ibidem invent', &c. which shews the conies to have been in his cloſe at the time of the taking; but if he had brought treſpaſs generally, *quare vi et armis ſex cuniculos cepit*, he could not ſay *ſuos* (a), and ſo it is agreed 22 H. 6. 59. b. Judgment was given for the plaintiff.

SUTTON v.
MOODY.

(a) 7 Co. 17. &
Cro. Elis. 225.

Smalcomb *verſ.* Owen Buckingham and Sir Cafe 24.

Edward Mills, *Sheriffs of London and Croſs.* [35]

In B. R.

THE caſe was this. *Croſs* had a judgment and took out execution thereon by a *ſieri facias* againſt one *Fox*, and delivered the writ of *ſieri facias* to the ſheriffs, but did not aſk for a warrant upon it, nor deſire it to be executed, but only left it with the [under] ſheriff at his office; *Smalcomb* the plaintiff alſo took out a *ſieri facias* upon a judgment which he had obtained againſt *Fox*, and it was delivered to the ſheriffs on the ſame day, but after the delivery of the other *ſieri facias* to them by *Croſs*; and *Smalcomb* demanded execution of his writ, which was accordingly done for him; and the ſheriffs made ſale of the goods and chattels of *Fox* for the debt due to *Smalcomb*; and afterwards *Croſs* and the ſheriffs took the ſame goods in execution upon that *ſieri facias* which was firſt delivered; whereupon *Smalcomb* brought an action of trover for them.

The firſt *Fi. Fa.* delivered to the ſheriff ſhould be firſt executed, but if he executes the laſt firſt, the execution is good, and the party muſt have his remedy againſt him.
1 Ld. Raym.
251. S. C. Holt
302. S. C.
12 Mod. 146.
S. C. 1 Salk.
320. 3 Salk.
159. S. C.
Carth. 419. S. C.
Comb. 428. S. C.
5 Mod. 376.
S. C. 6 Mod.
292. 2 Bac.
Abr. 456.
4 Bac. Abr.
460. 3 Com.
Dir. 308. 1 Term
Dir. 308. 1 Term

Rep. 749. Vin. Abr. Tit. Execution. (A. 2.) pl. 28. (Q. 2.) pl. 14. Time (A. 3.) pl. 6:

And it was urged for the defendants at the trial, that the firſt writ bound the goods, and that they could not be taken in execution by the plaintiff upon his *ſieri facias* which was laſt delivered. And Holt C. J. being in doubt upon this matter at the trial, ordered that the court ſhould be moved upon it. And now it was argued for the defendants, that at common law the goods were tied down by the *teſte* of the *ſieri facias*. Cro. Elis. 174. And if a *ſieri facias* was taken out one day, and another *ſieri facias* the next day; and the ſheriff exe-

SMALCOMB v.
OWEN.

[36]

cuted the second writ in the first place, it would have been avoided; and such construction ought to be made of the statute 29 Car. 2. c. 3. and is agreeable to the order observed by the common law; and therefore the writ first delivered should have the preference. And notwithstanding that at common law, if two writs of *feri facias* bear *teste* the same day, that which is first delivered and executed ought to stand; for it cannot be decided which issued first, for the priority ought to be tried by the record, which makes no distinction between writs that have the same *teste*; yet as it is enacted [by that statute], that a *feri facias*, or other writ of execution, shall bind the property of goods from the time of delivery to the sheriff, &c. and by consequence the time of the lien made subject to another manner of trial, [for this is matter of fact, and shall be tried by a jury, and may be proved] the time of the delivery is become the *terminus* from which the goods are bound; and the first delivery of a writ will so bind the goods, that they can never be sold by a *feri facias* delivered afterwards; and altho' there is no fraction of a day in law, yet the law rightly allows priority of time in the same day, or priority even in an instant. There may be a release of an obligation dated the same day with such release. *Cro. Eliz.* 161. And the penning of this statute of 29 Car. 2. seems to have respect to this objection; for the statute does not say, that a *feri facias*, &c. shall bind from the day, but from the time of delivery; (a) and the case in 1 Sid. 271. was cited, where a *feri facias* bore *teste* the 4th of July, the defendant became a bankrupt on the 6th of July; and in trover it was found by the verdict, that the writ was purchased on the 11th of July; yet it was adjudged, that the goods should become liable from the *teste* of the writ, which was on the 4th of July.

(a) 1 Keb. 930.
932.
2 Keb. 32.
3 Lev. 173.
S. C.
3 Lev. 69. 191.
3 Mod. 236.
4 Term Rep.
409.

But on another day judgment in the present case was given for the plaintiff by the whole court. And Holt C. J. declared their reason to be, for that at common law, if there were two writs of *feri facias*, the one bearing *teste* on such a day, and the other on the next day, and the last writ was first executed, such execution should not be avoided, and the party had

had no remedy but against the sheriff; for the sheriff ought to make execution at his peril, and the sheriff shall be excused if there was no default in him; as if he who took the first writ out conceals it in his hand, the sheriff may rightly make execution on another writ which bears the last *teste*, but came first to his hands. And it hath been held, that if a recognizance be extended, the executor ought to satisfy that before a judgment which is not prosecuted; and therefore in the present case, as he who first brought his *fiery facias* to the sheriffs did not desire that it might be executed, the sheriffs might rightly execute the last *fiery facias*, and such execution shall not be avoided. Judgment for the plaintiff.

SMITHSON v. OWEN.

[37]

Winter *vers.* Loveday. In B. R.

Case 25.

IN ejectment, upon a special verdict, the case appeared to be as follows: *George Pawlett*, seised of the manor of G. and other lands in fee, upon the marriage of his son *Edward* conveys the premises to the use of himself for life, afterwards to the use of *Elizabeth* the wife of his son for life, then to the use of *Edward* the son in tail, then to the use of himself in fee; in which settlement there was the following proviso, *viz.* Provided always, and it is the true intent and meaning of all the parties to these presents, that the said *George* during his life, and after that the said *Elizabeth* during her life, may make leases, &c. if in possession, for one, two or three lives, or for the term of thirty years, or for any other number or term of years determinable upon one, two or three lives, or in reversion for one or two lives, or for the term of thirty years, or for any other number or term of years determinable upon one or two lives; so as the said leases be not made of such part of the said manor of G. as are the demesne lands of the said manor, and so as the antient rent be reserved, &c. And it was found, that the said *George* made a lease (under which the defendant claimed) of the lands mentioned in the declaration, which were parcel of the lands

Power to make leases when well pursued.

1 Ld. Raym.
267. S. C.
2 Salk. 537. S.
C. Comb. 174.
S. C. Carth.
427. S. C.
1 Freeman. 507.
S. C. 5 Mod.
244. 378. S. C.
12 Mod. 147.
S. C. Holt 414.
S. C. Raym.
132. Poph. 8.
Moore 494.
6 Co. 33.
8 Co. 70.
Pow. on Powers
423. infra p.
312.

WINTER 9.
LOVEBAY.

[38]

lands held of the said manor by copy according to the customs, to hold after the expiration of a former lease determinable upon three lives, for the term of thirty years absolutely : and if the lease be warranted by the power, then the jury find for the defendant, otherwise for the plaintiff. And after argument at the bar, it was now upon a solemn argument adjudged for the plaintiff. The whole court agreeing, that the lease was not warranted by the power, but they differed in the reasons and grounds for their opinion : for by *Holt C. J. Turton* and *Eyre*, it was held, that the lease for thirty years absolutely was good within the proviso ; for the words of the proviso are, for one or two lives, or for the term of thirty years, or for any other number or term of years determinable on one or two lives, &c. where the repetition of the particle [for] disjoins and separates the sentence and makes so many distinct clauses, so that *George Pawlett* had power to make leases either for one or two lives, or for thirty years, or for any number of years determinable on one or two lives ; he had his election to make the one lease or the other ; if he could not lease but for thirty years determinable on two lives, the preposition [for] in the clause [for the term of thirty years] would govern the whole sentence, which would have been penned in this manner, viz. For the term of thirty years, or any number of years determinable, &c. or rather, for any term or number of years determinable on one or two lives ; for if such a construction were to be made, what occasion would there be for these words, [for the term of thirty years] ? they might be intirely omitted ; but as the sentence runs, for the term of thirty years, or for any other number or term of years, such repetition or reiteration makes them distinct clauses ; and as the first [for] governs the first clause, For the term of thirty years, so the last proposition [for] governs the latter clause, [for any term or number of years determinable, &c.] and explains the intent of the parties to be, that *Geo. Pawlett* might make leases for any number of years determinable on lives, so in like manner for thirty years absolutely ; and to prove this difference the Chief Justice cited two authorities ; the first

was

WINTER &
LOVEDAY

was 6 Co. 39. *Finch's case*; where dame *Katherine Finch* granted an annual rent of 20*l.* issuing out of the manor of *Eastwell*, &c. & *messuagis, terris, &c. dictæ Katherine, situatæ, &c. in parochiis de Eastwell & C.* in the county of *Kent*, or elsewhere in the same county, to the said manors or any of them belonging; and the question was, whether the other lands of the said *Katherine Finch* which were in the county of *Kent*, and did not appertain to the said manor, should be charged with this rent? And resolved that they should not; for the words (*aut alibi*) do not enlarge the lands charged with the rent, but only enlarge the villis in which the lands before charged did extend; but if the grant had run, *aut de terris alibi in eodem com'*, there the iteration of the words *lands and tenements* would have enlarged the lands and tenements out of which the rent was to have issued. The second was, where the king granted the manor of *S. nec non omnes terras & tenementa sua in S. nec non omnes terras & tenementa sua dicto manerio de S. pertinent'*; the manor of *N.* which was in *S.* but not part of the manor of *S.* passed. 1 *Leon.*

119. And *Holt C. J.* explained what was the nature of a lease in reversion thus; in the most ample sense, that is said to be a lease in reversion which hath its commencement at a future day, and then, it is opposed to a lease in possession; for every lease, that is not a lease in possession, in this sense is said to be a lease in reversion. But this is not the notion of a lease in the present case; if it were, then *George Pawlett* might have made leases to commence forty years afterwards; but a power ought to be taken strictly: and where any one is enabled to make leases generally, this impowers him to lease only in possession. 2 *Cro.* 34. *Yelv.* 222. (a) So where mention is made of leases in reversion in a power, this shall be intended of leases to commence after the end of a present interest in being; which is the second notion of a lease in reversion. But where a power is given to make leases for one or two lives in reversion, and to make leases for years; but a lease for life cannot be made to commence at a future day; and for that reason the very same expression (lease in reversion) will have a different signification in the

A lease in reversion is that which has it's commencement at a future day.
2 Salk. 537.
5 Mod. 381.
Pow. on Powers 424.

General power to make leases how to be construed. 5 Mod. 378. *infra* p. 315.
(a) *Cro. Jac.* 318. *S. C.*
1 *Brownl.* 142. *S. C.*

[39]

WINTER v.
LOVEDAY.
Pow. on Powers
425.

Under a power
to make leases
in possession or
reversion, a man
may make either
but not both.
1 Ld. Raym. 269.
Pow. on Powers
427.

[*40]

Copyhold lands
are parcel of the
demesnes of a
manor.
Carth. 427.
2 Ld. Raym.
267. 2 Salk. 537.
1 Freem 507.
5 Mod. 245.
6 Mod. 20.
22 Mod. 147.
Pow. on Powers
398.

same conveyance; being applied to a lease for life, it shall be intended of a concurrent lease, or a lease of the reversion, viz. a lease of that land which is at the same time under a demise; and then it is not to commence after the end of the demise; but hath a present commencement, and is concurrent with the prior demise; but being applied to a lease for years, it shall be intended of a lease which shall take its effect after the expiration or determination of a lease in being. And *Holt C. J.* added farther, that he thought that if a power enabled any one to make leases in reversion as well as in possession, he cannot make a lease in possession, and another lease in reversion of the same land; but * his power to make leases in reversion shall be confined to such land as was not then in possession: but in the case in dispute, it is not found whether the customary land, of which the lease in reversion was made for thirty years, was in possession at the time of this marriage settlement. But notwithstanding that the three judges were of opinion, that the power was well pursued by a lease of thirty years absolutely; yet they held, that this power did not warrant a lease of copyhold lands held of the manor; for the qualifications of this power are, "So as such leases be not made of such part of the said manor of G. as are the demesne lands of the said manor, and so as the antient rent be reserved"; but customary lands are part of the demesnes of a manor, and the pleading is, that the lord is seised of a manor *in dominico suo ut de feodo*. A manor consists of demesnes and services, and upon the grant of a manor the tenants ought to attorn for their services; but copyholders have no occasion to make an attornment; for their tenements pass by the grant as parcel of the demesnes. *Lit. sect.* 556. and *Co. Lit. ibid.* And if a common person grants all the demesne lands of a manor, the copyhold tenements held of the manor pass; for they are parcel of the demesnes of a manor. 1 Co. 46. *Alton Woods*. But it was objected from the bar, that if customary tenements are parcel of the demesnes of a manor, then here is nothing that could have been demised, and yet it was intended that

that *George Pawlett* should have power to make leases of so much of the manor as was not the demesnes: To which it was answered by *Turton* and *Eyre*, that there are other lands mentioned in the conveyance to which the power to make leases may extend. But *Holt* C. J. thought that this was not a full answer, because it appears to be the intent of the settlement, that part of the manor may be demised; and was of opinion, that the rents and services may be demised within this power: and notwithstanding that the other qualification annexed to the power says, that the ancient rent shall be reserved; and no reservation of a rent can be upon a lease of rents and services, out of which no rent issues, yet the rents and services (he thought) might be demised within this power; for it appears, that part of the manor was intended to be comprized within this power, but the demesne lands are not to be comprized; then the rents and services must be; for the whole of the manor consists in demesnes, rents and services: and if a man hath a power reserved to him of making leases of two things, and a qualification is annexed to the power, which cannot extend to one of these things, he may make a lease of that thing, without any regard to the qualification; as where there is a power to make a lease of a manor, and every part thereof, so that such a rent be reserved upon every lease, as was paid for two years before, and it happens, that some part of the land was not leased at any rent within two years before; a man may make a lease of such land reserving what rent he pleases; for the intent appears to be, that he might make leases of the whole manor. 2 *Roll.* 26. pl. 10. And upon this authority was founded another such resolution, *Hil.* 27 & 28 *Car.* 2. (a) between *Baker* and *Baker*, where a man had power to make leases of a rectory, tithes and other lands, reserving the ancient rent; and it was held, that he might make leases of tithes, although no rent can issue out of tithes; but he might demise them without any rent, if it had pleased him; for it appeared that tithes were within the power. *Rokeby* J. was of opinion, that judgment should be given for the plaintiff; but he differed in the reasons of his resolution from the rest

WINTER V.
LOVEDAY.

[41]

2 *Cro.* 76.
6 *Co.* 37.
If a man has a power reserved to him of making leases of two things, and a qualification is annexed to the power, which cannot extend to one of these things, he may make a lease of that thing, without regarding the qualification.
Pow. on Powers 405.
Fort. 332.

(a) 1 *Freem.* 413.
1 *Vent.* 294.
2 *Lev.* 150.
3 *Keb.* 544.
547. 586. 595.
This case is known by the name of *Wakeman v. Wake*.

of

WINTER C.
LOVEDAY.

[42]

Every power
shall be taken
with such a re-
striction that
the estate shall
not be destroyed
by it.
Pow. on Powers
407.

of the judges: for he thought that by the power in the settlement *George Pawlett* might make leases, but with these restrictions, which are expressed or implied. First, that no land should be demised which was used for the maintenance and sustentation of the family; for a lease of such land is prohibited by these words, "So as the lease be not made of any of the demesne lands, &c." By which words it was intended, that *George Pawlett* should not make leases of such land as was in the proper occupation of those who should be seised of the manor; but it was not intended to restrain leases of customary land held of the manor. Secondly, That no land should be demised without reservation of the ancient rent; for it was intended that the ancient income and revenue should be preserved according to the custom of leases in the Western parts of *England*. Thirdly, That no land should be demised absolutely, but every demise should have its determination upon lives; which three restraints are expressed in the settlement. Then the power annexed to the estate ought to be expounded strictly, and with a reasonable intentment; for every power shall be taken with such a restriction, that the estate itself shall not be destroyed by it; so here there is a restraint from making leases of customary land held of the manor, not by the express words, ("so as it be not of the demesne lands", which words by the intent of the parties do not extend so far,) but by implication; for if the customary lands might be demised, the manor will be destroyed; which could not be the intent of the parties. And so for these reasons, First, because the lease was for thirty years absolutely, without being determinable upon lives, (in which he went contrary to the other three judges); Secondly, For that a lease of the copyholds would by consequence destroy the manor, *Rakeby* held that judgment should be given for the plaintiff. Therefore by the whole bench it was adjudged for the plaintiff.

Richards *vers.* Corneford. In B. R.

Case 26.

ERROR of a judgment in *C. B.* in replevin, for cattle taken on the 26th of *September*. The defendant avowed the taking as a distress for rent reserved on a lease for years, which was made under the title of *Christopher* late Duke of *Albemarle*; and for the rent of two years and an half ending at *Michaelmas* the 29th of *September*, &c. he avowed. And this was now assigned for error; for the distress was made before *Michaelmas*, when the rent was in arrear; and notwithstanding that it was urged by *Mountague*, that the distress was well made for the rent of two years; yet the Court without difficulty reversed the judgment; for the avowry is for one entire rent, and the judgment accordingly, but before judgment, the avowant might have abated his own avowry for the half-year, and prayed judgment for the residue, and this would have been good. Judgment reversed *nisi causa*.

An avowment in replevin may abate his own avowry for part of the rent distrained for, before, but not after, judgment. 1 Ld. Raym. 255. 5 C. 5 Mod. 363. S. C. 2 Salk. 580. S. C. Con. Jac. 473. 1 Rolle's Rep. 77. Moore 281. Hob. 208. 11 Co. 49. b. T. Jones 132. Vin. Abr. tit. Avowry (X.) pl. 1. Replevin. (M.) pl. 9.

But afterwards the record was amended in *C. B.*

The King v. Gripe. In B. R.

Case 27.

THIS was an information for perjury. The information set forth that the defendant being sworn as a witness, had deposed (*to wit*) Master *Geo. Stroud* about the middle of *July* 1681, was at *Newnam* (*domum ipsius Magistri Stroud vocat Newnam apud Plimpton Ste. Mar' in com' Devon innuendo, ubi revera prae Georgius Stroud circa medium Julii vel in aliqua parte ejusdem mensis Julii non fuit apud Newnam prae*). And after a verdict for the king, the judgment was arrested by the opinion of the whole bench, after several arguments at the bar, for the insufficiency of the information, because the information did not shew where *Newnam* was, only in the *innuendo*. (1)

[43] An information for perjury shall not be supplied by the innuendo. [This case is more fully reported in the books quoted below. 1 Ld. Raym. 356. 5 Mod. 343. 12 Mod. 139. 2 Salk. 513. Carth. 421. Holt 535. Comb. 459.] 1 Hawk. P. C. 318.

(1) Holt Ch. Just. held in this case, "not the issue, yet 'tis perjury. 2 Salk. "that if a man gives evidence to the "514." "credit of a witness, though this be

Case 28.

Anonymous. In Chancery.

A drawer of a bill of exchange, though given without consideration, shall not be relieved against a third person to whom it was assigned for an honest debt. Doug. 3d edit. 636. Cunning. Bills of Exch. 119. Reynolds v. Dundas. 1 T. Rep. 40. 2 T. Rep. 71. 2 Ark. 182. Bull. Ni. Pri. 274.

A. Gave a bill of exchange for value received, **B.** assigns it to **C.** for an honest debt; **C.** brings an *indebitatus assumpsit* on this bill against **A.** and had judgment; on which **A.** brings his bill to be relieved in equity against this judgment, because there was really no value received at the giving of this bill, and **C.** would have no prejudice who might still resort to **B.** upon his original debt: It was answered that **A.** might be relieved against **B.** or any claiming as servant or factor of, or to the use of **B.** But the Chancellor held that **C.** being an honest creditor and coming by this bill fairly for the satisfaction of a just debt, he would not relieve against him, because it would tend to destroy trade which is carried on every where by bills of exchange, and he would not lessen an honest creditor's security. (1)

(1) *Morris versus Lee*, B. R. H. 26 Geo. 3. In an action by the indorsee against the maker of a note, thirteen years old, the defendant obtained a rule nisi to set aside a judgment obtained by default on an affidavit by a third person, that he believed the defendant was swindled out of the note. An affidavit was made

on the other side, that the plaintiff took the note *bona fide*, and gave a valuable consideration for it: and the Court held that however improperly it might have been obtained, a third person who took it fairly, and gave a consideration for it, was entitled to recover, and discharged the rule. Vide *Bayley's Treatise on Bills of Exchange*, p. 69. 74.

Case 29.

Dorn vers. Gashford. In B. R.

[44]

Termor for years cannot declare upon a *que estate*. 1 Ld. Raym. 266. S. C. Carth. 432. S. C. 2 Salk. 363. S. C. 2 Salk. 562. 5 Com. Dig. 80. Skinn. 36. 2 Show. 295. S. C. 2 Mod. 318. S. C. Vin. Abr. dt. *Que Estate*. (D.) pl. 9.

ACTION upon the case for the obstruction of a way brought by a lessee for years; who declared *quod ipse & omnes illi quorum statum ipse habet in messuagio pred' de tempore cujus contrarii memoria hominum non existit habuerunt & de jure habere consueverunt quandam viam* to such a place; and after a verdict for the plaintiff, *Northey* moved in arrest of judgment, and took the following exceptions. First, that a lessee for years ought not to claim by a *que estate*. Secondly, here is not laid any *terminus a quo* the way begins. *Wright* Serjeant answered to the first objection, that it is true that a lessee

lessee for years cannot claim by a *que estate*, but that the declaration would have been sufficient if the plaintiff had said only *quod ipse habuit & de jure habere consuevit quandam viam*; for in such an action for the obstruction of a way the plaintiff need not make any title, as it was resolved 2 Cro. 123. and between *St. John* and *Moody*, 1 Vent. 275. and between (a) *Blockley* and *Slater* in C. B. and then the addition of [*omnes illi quorum statum de tempore cujus, &c.*] is surplusage and shall be rejected after verdict. To the second objection he answered, that the plaintiff ought to shew a *terminus a quo*, and this would have been ill upon demurrer, but after a verdict it is helped; for the jury have found that the plaintiff had a way and it is not material from what place it begins.

DORN W.
GASHFORD.

2 Ld. Raym.
751. 1093.

(a) 1 Lutw.
119. *supra* p. 8.

A third exception was taken to the declaration; but the Court said nothing to the second or third exception, but upon the first the judgment was arrested; for the Court agreed that the declaration would have been good without the allegation of any title in the plaintiff; as it was settled in the case between *Stroud* and *Birt*; (b) but as the plaintiff hath set forth a title by prescription, and failed in it, it is ill and shall not be aided: And *Holt*, C. J. said, that in the time of Lord Chief Justice *Hale* it was held ill, that the plaintiff being a lessee for years had declared that he was possessed of an antient messuage; for an antient messuage shall be intended to be one time out of memory; yet there the plaintiff had declared that he was possessed, and it was said that it ought to be proved upon evidence, as the plaintiff had so declared upon prescription, otherwise the plaintiff could not recover. And judgment in the principal case was arrested.

(b) *Supra* p. 7.

[45]

Thompson *vers.* Leach. In B. R.

Case 30.

Ejectment on the demise of *Charles Leach*; the defendant pleaded not guilty, and a special verdict was found to this effect, *viz.* *Nicholas Leach* being seised in fee of the lands mentioned in the declaration, by his will dated the

Whether the
surrender of a
person that was
non compos mentis
is absolutely
void.

1 Ld. Raym.
9 Lev. 284. S. C.
1 Mod. 301. S. C. 12 Mod. 173. S. C. 2 Vent. 198. S. C. Saik. 427. 576. 675. S. C. Show.
P. C. 150. S. C. 1 Show. Rep. 296. S. C. 1 Eq. Caf. Abr. 478. pl. 3. 2 Ch. Caf. 503.
2 Vern. 189. Harg. Co. Litt. 137. b. n. 1. Fearn's Con. Rem. 4th edit. 431. 467. 4 Bac.
Abr. 315. 1 Pow. on Cont. 12.

VOL. I.

R

19th

THOMPSON v.
LEACH.

19th of December 19 Car. 2. devised them to his brother-
Simon Leach for life, remainder to the first son of his body
begotten, and the heirs male of the body of such son, remain-
der to the second and third son, &c. in tail male; and for de-
fault of such issue, remainder to Sir *Simon Leach* and the
heirs male of his body, and for default of such issue, remainder
to the right heirs of *Nicholas* the testator, who died seised;
and after his decease, *Simon Leach* being *non compos mentis*, on
the 23d of August, 25 Car. 2. executed a deed of surrender to
Sir *Simon Leach*, (whether such a surrender was good without
the notice of Sir *Simon* was doubted in *C. B.* and there ad-
judged that it was not by three of the judges against *Ventris*,
see 2 *Vent.* 198. and this was afterwards affirmed in error
brought in *B. R.*) After such surrender, viz. on the 1st of
November, 25 Car. 2. *Simon Leach* had issue *Charles Leach* the
lessor of the plaintiff; *Simon Leach* dies, and *Charles* his son
enters as in his remainder, and Sir *Simon Leach* ejects him,
&c. *Wright*, Serjeant, who argued for the plaintiff, reduced
the case to two questions; first, whether the deed of surren-
der made by *Simon Leach* tenant for life, he being *non compos*
mentis, was void or only voidable? Secondly, admitting that
it was only voidable, whether *Charles* the lessor of the plaintiff
could avoid it? But by *Northey* on the other side, and the
Court, it was agreed that the second question could not in
this case come into debate; for the surrender of *Simon Leach*
the tenant for life, made to Sir *Simon Leach* in the remainder
before the birth of *Charles* the lessor of the plaintiff, had de-
stroyed the contingent remainder, the which *Charles* claims, if
ever such surrender was good, notwithstanding even if it was
afterwards avoided; for if the particular estate be destroyed
before the contingency happens, the contingent remainder
cannot vest, for the remainder ought to take effect during the
particular estate, or *eo instante* that the particular estate deter-
mines. If a man grants or bargains and sells the reversion to
husband and wife, seised for life in right of the wife, the mesne
contingent remainder is destroyed; yet the wife may waive
the estate after the death of her husband, 2 *Saund.* 386. for
(as *Northey* said) a future right of entry cannot support a con-

[46]

2 Salk. 576.
Comb. 438.

A future right
of entry will not

support a contingent remainder. 1 *Ld. Raym.* 314. *Fearne's Con. Rem.* 4th edit. 433. A pre-
sent right will. 1 *Ld. Raym.* 314. *Fearne's Con. Rem.* 4th edit. 430. 433. 12 *Mod.* 174. 1 *Vent.*
188. 1 *Mod.* 92. 2 *Lev.* 35. 2 *Salk.* 577.

singent

THOMPSON &
LEACH.

tingent remainder, but a present right of entry may : as where a man who is tenant for life is disseised, the contingent remainder thereupon descendant is not destroyed. And *Northey* cited *Cro. Car.* 102. if a feoffment is made to the use of the husband and wife, remainder to the heirs of the survivor, and the husband afterwards makes a feoffment, the contingent remainder to the survivor is destroyed. But *Holt C. J.* said that was a very nice case, for the wife might avoid that estate, and at the death of the husband, as her time to avoid it then happened, the contingency also happened at the same time. And *Holt C. J.* also said, that if a man who is tenant for life with a contingent remainder, makes a feoffment with condition, and afterwards enters for breach of that condition, the contingent remainder is destroyed, if the contingency happened before the condition broken ; so also if the contingency happens before the entry, although it be after the condition is broken ; for a title of entry is not sufficient to support a contingent remainder, any more than a future right ; but if the tenant for life enters for breach of the condition and revives his estate, and that before the contingency happens ; in such case the contingent remainder may vest, for by the re-entry of the tenant for life he is restored to his former estate ; and for the same reason here in the present case, if the surrender of *Simon Leach* who was *non compos mentis* was only voidable, the particular estate was still destroyed by such surrender for such time as it remained in force ; besides the particular estate was expired and determined by the death of *Simon Leach*, and how can his heir avoid an estate which is executed ? an avoidance is of a tortious * act, and restores the estate ; but here the surrender of the tenant for life was in force during his life, and after his death it cannot be restored or revived, for it is absolutely determined and hath no essence or being at all : wherefore *Northey* was of opinion, and the Court with him, that the second question might be waived, and that this was the only question in the case, viz. Whether the surrender of a person who was *non compos mentis* was absolutely void ? *Northey* argued that it was not void, for he himself [*Simon Leach*] could not avoid it ; and if it was void, it must be void to all intents and purposes, and how then can that man's deed be void which binds himself ? But *Holt C. J.* inclined to the opinion that his [*Simon Leach*] deed

If the tenant for life enters for breach of the condition before the contingency happens, the contingent remainder may vest.
1 *Ld. Raym.* 314.
1 *Freem.* 508.
Holt. 623.
2 *Salk.* 577.
Fearne's Con. Rem. 4th edit. 510.
Vide 4 *Bac. Abr.* 313.
where Chief Baron Gilbert maintains a different opinion.
[*47]

THOMPSON v.
LEACH.

Evidence of infancy cannot be given in avoidance of a deed.
1 Ld. Ray. 315.
3 Burr. 1805.
12 Mod. 174.
Comb. 468.

was void, although it might have been in force against the *non compos mentis* himself, for that being in force against himself is founded upon the maxim, that no man shall be admitted to disable himself; the deed of an infant is void, although he cannot plead *non est factum*; for when it hath all the essentials of a deed, it shall be intended that the maker was of full age, if he does not plead nonage. *Sed adjournatur.* (1)

(1) The plaintiff had judgment, but a writ of error was thereupon brought into the House of Lords. In 3 Lev. 285. it is said that the judgment was reversed contrary to the opinions of the judges assisting, excepting *At-*

kyns Ch. Bar. and *Ventris*. The same is laid down in Carth. 250. In Show. P. C. 154. & 1 Ld. Raym. 316. it is declared that the judgment was affirmed: but to explain this diversity consult 3 Danv. Abr. 164, in the note.

Cafe 31.

Jones *vers.* Moseley. In B. R.

Vide *supra* p. 29. and the cases there cited. Deeds to lead the uses of fines.

THE case before mentioned was now argued by Mr. Broderick for the plaintiff, and by Mr. Webb for the defendant: and Broderick insisted that the indenture of the 31st of *January*, although it might not be good as an indenture, yet may be taken as a deed poll, and is sufficient to declare the uses of the fine, which not being levied pursuant to the indenture of the 29th of *January*, but being variant from it in the circumstance of time, any other deed or averment is sufficient to declare the uses thereof, which for that reason shall be governed here by the deed of the 31st of *January*. Webb on the other side said, that the deed of the 31st of *January* being between husband and wife was void, (for the husband cannot make a covenant with his wife) and being void as an indenture it cannot be taken as a deed poll. But he thought that the principal point in this case was, whether the indenture of the 29th of *January* was not sufficient to govern the uses of this fine? the indenture recites, that whereas a fine had been acknowledged, &c. the said parties should levy the said fine of such and such lands next *Hilary* term; and the fine was levied of the same parcels and between the same parties the same *Hilary* term, for the indenture bears date within *Hilary* term, which begins on the 23d of *January*; then it is

to

Supra p. 29.
Infra p. 334.

[48]

to be considered whether the words [next *Hilary* term] shall be intended of *Hilary* term next after the caption of the fine, or of *Hilary* term next after the date of the indenture; the most benign construction in this case ought to be made, *ut res magis valeat, &c.* And as the word [next] may be applied either to the caption of the fine or to the date of the indenture, it ought to be applied here to the caption of the fine, forasmuch as by such application the whole conveyance will be good, but otherwise it will be destroyed.

D E

Term. Sanct. Hill.

9 Will. III. In B. R.

Case 32,

Anonymous.

A contract performable as well before, as after a day mentioned in the statute of 8 & 9 W. 3. c. 32. at the election of the party, is not within that act of parliament.
 1 Ld. Raym. 316. 673.
 T. Jones, 102.
 1 Vent. 330.
 S. C.
 2 Lev. 227,
 S. C.
 2 Mod. 310.
 S. C.
 1 Freem. 466.
 S. C.

Assumpsit. The plaintiff declares, that the defendant, in consideration of 20*l.* given to him by the plaintiff, assumed on the 29th of *October* 1696. to assign 500*l.* in bank-stock to the plaintiff for the sum of 365*l.* at any time when he should be requested before the 10th day of *May* then next ensuing; and the question arose upon the statute of 8 & 9 W. 3. c. 32. by which it is enacted, that every policy, contract, &c. made or to be made by any person or persons whatsoever, and which by the tenor thereof is to be performed after the first day of *May*, 1697, upon which any premium already is, or hereafter shall be given or paid for liberty to put upon or to deliver, receive, accept or refuse any share or interest in any joint-stock, tallies, orders, exchequer-bills, exchequer-tickets, or bank-bills whatsoever, (other than such contracts, &c. as are to be performed within three days from the time of the making,) shall be utterly null and void to all intents, &c. By which statute, every contract by the tenor of it to be performed after the 1st day of *May* 1697. is avoided: And whether this contract which was made on the 29th of *October* 1696. by which the plaintiff had time to request the assignment of the bank-stock to be made to him until the 10th day of *May* 1697, was within the statute, and made void thereby,

thereby, was the question in debate. And *Nortbey* argued that it was not, for this is not a contract, which by the tenor of it is to be performed after the first day of *May* 1697. For altho' the plaintiff had liberty to perform the request of the assignment of the bank-stock to him until the 10th day of *May* 1697. which was nine days after the act took place, yet such request might be made before the first of *May*, and so the contract by the tenor of it was not to be performed after the 1st day of *May*; for a contract to be performed after the first day of *May* is intendable of such a contract which of necessity ought to be performed after that day, and cannot be performed before; but a contract performable as well before as after that day, at the election of the party, is not within the act of parliament, but is *casus omiffus*; and he compared it to a case upon the statute of 29 Car. 2. c. 3. of frauds and perjuries, by which it is enacted, that no action shall be brought, &c. whereby to charge any person, &c. upon any agreement which is not to be performed within a year from the making thereof, unless the agreement be in writing; and an action was brought upon an agreement by the defendant to pay so much upon his marriage, but without any writing or memorandum of the agreement, and the defendant did not marry within the year: upon the trial at *Guildhall* before *Holt* C. J. he was in doubt, whether that agreement was within the statute, and whether it ought not to have been by writing? and ordered that the opinion of the judges of the court should be taken. And by the major part of the judges in *B. R.* it was resolved, that this was *casus omiffus*; for that the defendant might have married within the year; and so it was not an agreement which was not to be performed within a year, and by consequence was not such an agreement as was intended by the act of parliament; and he said he did not see any diversity between the cases.

ANONYMOUS.

[50]

An agreement which might have been performed within a year after the making of it, is not within the statute of frauds, though it should not be performed until the year is expired.

1 *Ld. Raym.* 317. 1 *Salk.* 280. 3 *Salk.* 9. *Holt* 326. *Skin.* 353. *S. C.* 3 *Burr.* 1278. 1 *Blackst. Rep.* 353. *S. C.*

Ram *vers.* Thacker. In *B. R.*

Case 33.

ERROR of a judgment of the King's Bench in *Ireland* depending here for many years, and the judgment was now affirmed. The case was upon divers acts of settlement made in *Ireland*, by which every one who accepted letters

Where an act of parliament shall have the effect of a recovery.

E 4

patent

RAM V.
THACKER.

patent should have thereby a clear estate, and avoid all former settlements, or to that effect. *Waldron*, the lessor of the plaintiff, was the issue in tail and heir male, who claimed under a settlement made by his ancestor on marriage, by which the estate was intailed, and after such settlement made that ancestor surrenders his estate, and takes out new letters patent: and whether such surrender and acceptance of a new patent had avoided the prior settlement made a short time before was the question. And it was resolved that they had avoided it; for by the settlement he had an estate-tail, which might have been docked; and therefore such surrender and acceptance shall have the force of a recovery by the operation of the statute; and so the estate-tail was barred, and the estate descended to the heir-general, who was married to *Thacker* the defendant.

Case 34.

Britton vers. Cole. In B. R.

Outlawry. The
moveables of a
stranger levant
and couchant
may be taken on
a *levari facias*.
1 Ld. Raym.
305. S. C.
Raym. Ent. 145.
5 Mod. 109.
112. S. C.
Saik. 395. 408.
S. C.
Comb. 434. 469.
S. C.
Carth. 441. S. C.
Skin. 617. S. C.
12 Mod. 175.
S. C.
Holt 421. S. C.
Raym. 17.
Hard. 101.
2 Bac. Ab. 352.

TRespafs for the taking of forty-three ewes and two lambs. The defendant pleaded, that one *Chifwick* was outlawed, and that after outlawry an inquisition went; upon which it was returned, that *Chifwick* was possessed of lands, where the ewes and lambs were taken, to the value of 55*l. per annum*, and afterwards a *levari facias* issued out of the Exchequer, commanding the sheriff to levy the said value out of the issues of the said lands; upon which the sheriff made out his warrant to *A.* and *B.* to levy, &c. To whom the defendant shewed the said ewes and lambs, being levant and couchant upon the land, and prayed them to make execution, &c. which is the same trespass upon which, &c. Upon this plea the plaintiff demurred. And after divers exceptions to the pleadings, and divers arguments to the matter of law, the Court now declared their opinion. And *Holt C. J.* who spoke for the rest of the judges, declared, that the Court was of opinion, as to the matter of law, with the defendant; and this was the case: *Chifwick* was outlawed, an inquisition goes, upon which it is returned, that he had land to the value of 55*l. per annum*; afterwards, upon a *levari facias*, the cattle of a stranger levant and couchant upon the land are taken
and

and sold: and it was the opinion of the Court, that the cattle of a stranger may well be sold in such a case, for they are the issues of the land; the statute of *Westm. 2. 13 Ed. 1. c. 39.* explains what shall be accounted issues of land, (to wit) rents, corn, and all moveables; the which word [moveables] extends to cattle. The cattle of the owner of the land are issues without question, and so are also the cattle of a stranger levant and couchant; for the statute makes no distinction, and the words of the statute are general, viz. all moveables. Another reason why the cattle of a stranger may be taken upon a *levari facias* is, because the land is the debtor to the king; and if the cattle of a stranger could not be taken when they are levant and couchant, the king may be defeated of all the profits; for the person outlawed may make a contract with a stranger to depasture his cattle, and so avoid the effect of the outlawry; for such a contract cannot be discovered, or if it be, there can no levy be made by the king. The writ of *levari facias* commands the sheriff, that he levy *de exitibus terra*; and if there are not any issues upon the land, but only the cattle of a stranger, and those cannot be taken, the king cannot be answered with any profit. The cattle of the party outlawed cannot be the only things to be taken, for he hath no goods, all his goods are forfeited to the king; and therefore if it were said, that his cattle only ought to be taken, it must follow that the king should be satisfied out of his own proper goods. But it ought to be considered what process issue out of the Exchequer, for the better understanding of this matter; the process of *capias* extends to the person; the process of *feri facias* extends only to the goods and chattels of the person himself, but not to those of a stranger; another process is the *extendi facias*, and this is only an extent upon the land; another process is called the *long capias*, the which contains all the precedent ones; for by this it is commanded, that the sheriff take the body, levy the goods and chattels, and extend the land of the debtor; but in none of these processes can the goods of a stranger be taken: but the *levari facias* extends to the issues

BRITTON v.
COLE.

The cattle of a stranger levant and couchant thereon are issues of the land, and as such may be sold. 1 Ld. Raym. 306. Salk. 395. Holt 421. Skin. 617. Cattle ar: included under the general word moveables. 1 Ld. Raym. 306. 2 Inst. 453. Fleta lib. 2. cap. 68.

1 Ld. Raym. 307. Gilb. Exchequer, 117 to 125.

In all cases where a *levari* 308. Salk. 395.

facias issues, the land is debtor. 4 Com. Dig. 485. Skin. 619. 1 Ld. Raym. 308. Salk. 395. Holt 421. infra p. 252.

BRITTON v.
COLL.

(a) 2 Ro. Abr.
159. p. 2, 3.
Goldf. 140.

[*53]

of the land; the land is the debtor, and all moveables upon the land may be taken; and therefore it is adjudged *Cro. Eliz.* *431. *Stafford* and *Bateman* (a) that upon a *feri facias* the goods of a stranger could not be sold for a debt to the queen. (1)

(1) Judgment in this instance was law was in favour of the defendant. entered for the plaintiff, owing to some 1 Ld. Raym. 310. defects in the pleadings, though the

Case 35.

Goodwin *vers.* Bearbank. In B. R.

Fifteen days between the *teste* and return of two *scire facias*: inclusive is sufficient.

2 Salk. 599. S. C.
Carth. 468. S. C.
12 Mod. 215.
S. C.

Molt. 759. S. C.
Cro. Eliz. 738.
2 Blackf. Rep.

922.
2 Str. 765. 1139.
Skinn. 633.
1 Lutw. 26.

6 Mod. 146.
4 Bac. Abr. 422.
5 Com. Dig. 343.
1 Rich. Pr. K. B.

448.
2 Crompt. Pr.
78.

JUDgment against a testator; and a *scire facias* was brought thereupon against the executor, bearing *teste* the 24th of *October*, and returned *die Lune prox' post mens' Michaelis*, which was in truth the 31st of *October*; then the second *scire facias* bore *teste* the 31st of *October*, and was returnable *die Lune prox' post Crastinum Animarum*, which was the 7th of *November*. And now it was moved by Sir Barth. Shower, that the *scire facias* was erroneous; for there are not fifteen days between the *teste* and return of the *scire facias*, but only fourteen. *Sed non allocatur*. For it was answered by Broderick, and agreed to by the Court, that it was right; for between the *teste* and the return of the first *scire facias* there are seven days exclusive; and between the *teste* and return of the second *scire facias* there are seven days exclusive; so between the *teste* of the first and the return of the last *scire facias* there are fourteen days exclusive, and fifteen days inclusive, which are sufficient; and so it was resolved between *Levingston* and *Stoner*, B. R. *Mich.* 34 *Car.* 2. which is reported 2 *Jon.* 228.

And in *Levingston's* case the Court would not take notice by the *almanack* of the day of the month, in order to avoid a *scire facias*.

D E

Term. Sanct. Mich.

10 Will. III. In B. R.

Heylin, Executor of Read, *vers.* Capt. Hastings. Case 36.

Indebitatus assumpsit for goods sold and delivered by the testator to the defendant. The defendant pleaded *non assumpsit infra sex annos*, and at the trial before Holt C. J. at Guildhall, the evidence for the plaintiff was as follows: that the goods were sold and delivered to the defendant by the testator in the year 1688; that within three years now last past (so more than six years had elapsed since the cause of action had accrued) the defendant promised, that if the plaintiff could prove his debt, he would pay it; and whether this evidence proved the issue for the plaintiff, Holt C. J. doubted at the trial, and directed the matter to be moved for the opinion of the Court. And it was agreed by the whole Bench, that if a man is indebted to another, and six years elapse afterwards, and then the defendant promises payment and acknowledges the debt within six years before the action brought, evidence of such promise and acknowledgment is good to maintain an action, where *non assumpsit infra sex annos* is pleaded; but if a man after the six years acknowledges the debt, but does not promise the payment, it shall not charge him; by *Rokeby J.* But Holt C. J. said, that it had oftentimes been held

A conditional promise will avoid the statute of limitations.
5 Mod. 425.
S. C.
Carth. 470. S.C.
12 Mod. 223.
S. C.
Holt 427. S. C.
1 Ld. Raym.
389. 421. S.C.
1 Salk. 29. S.C.
Cowp. 548.
1 Com. Dig.
154.
3 Bac. Abr. 517.
Bull. Ni. Pri.
142.

HEYLIN v.
HASTINGS.

[55]

held that an acknowledgment of the debt without promise of payment by the defendant was sufficient to charge him, and this he thought was good law, but that it had been held otherwise also; and it was agreed by the Court, that if the plaintiff had declared upon a special assumption, *viz.* that his testator having sold such merchandize to the defendant, the defendant, in consideration that the plaintiff could prove the said debt, promised that he would pay and content the plaintiff the said sum of money, and had averred that his testator had sold the goods; the defendant upon such special declaration would have been chargeable, and the plaintiff in such a case needs only to alledge that the testator had sold, for the proof of the debt will be brought in the same action. But the doubt was upon such a conditional promise after the action was barred by the statute, whether that should give an action founded upon the first contract; if it had been made before the six years had been passed after the first contract, *Holt C. J.* thought it would have been sufficient although six years had passed before the action commenced; but here seems a diversity, for the action is gone before this conditional promise is made. *Sed adjournatur.*

And now *Holt C. J.* said that he had talked with all the judges of *England*, and that ten of them upon consideration agreed that such a parlance, as *prove it due and I will pay you*, after six years elapsed, was sufficient evidence for the plaintiff to maintain his declaration, upon *non assumpsit infra sex annos* pleaded. For the defendant here makes an express promise *I will pay you*, but it is conjoined with this condition *prove it due*; so he expressly promises payment upon proof of the debt, which proof may be made in the same action. And they all agreed also, that if a man acknowledges a debt after six years elapsed, it is good evidence of an *assumpsit*, upon *non assumpsit infra sex annos* pleaded, for the jury to find a verdict for the plaintiff, but it is not a matter upon which, if it were found specially, the Court will give judgment for the plaintiff. And *Rokeby* resembled it to the case 10 Co. 57. a. Demand and

An acknowledgment of a debt is evidence only of a promise to pay it.

1 *Ld. Raym.*
422. *Holt* 428.
12 *Mod.* 224.
5 *Mod.* 426.
Carth. 471.

1 *Blackf. Rep.*
703. *Prec. in*

Ch. 386. 2 *P. Wms.* 374, 375. 4 *Burr.* 1099. 5 *Burr.* 2640. 6 *Mod.* 309. 1 *Com. Dig.*
154. 3 *B. & C. Abr.* 517.

refusal

refusal is evidence of a conversion, (a) but if it is found specially, the Court cannot adjudge it to be a conversion; so this term judgment was given for the plaintiff. (1)

HEYLIN v.
HASTINGS.

(a) 5 Mod. 426.
Cro. Eliz. 495.
Moore 460.
Hob. 187.

1 Mod. 245. Style 361. 3 Burr. 1243. 5 Burr. 2826. 1 Vent. 401. Cro. Jac. 245. 6 Mod. 212. 2 Salk. 655, and the cases there cited. 1 Com. Dig. 220. 5 Bac. Abr. 259. Infra p. 157.

(1) It was holden in the case of *Yea v. Fomrager*, 2 Burr. 1099. "that an acknowledgement of the debt, after the commencement of the action takes it out of the statute of limitations." Lord Mansfield lays it down in 5 Burr. 2630. "That the statute of limitations does not destroy the debt, it only takes away the remedy. And the slightest word of acknowledgement will take it out of the statute."

De Term Sanct. Hill. 10 & 11 Will. III.

THIS term Sir Henry Gould, Knt. Serjeant at Law, received letters patent to be a Judge of the Court of King's Bench, in which office he succeeded Sir Samuel Eyre, Knt. who in the summer assizes died upon the circuit.

Termino Pasch.

11 Will. III. In B. R.

Cafe 37. The Governors of the Bank of England vers. Newman.

Bill of exchange
where the re-
ceipt of it shall
be tantamount
for the receipt
of the money.
1 Ld. Raym.
442. S. C.
12 Mod. 241.
S. C.
Bull. Ni. Pri.
edit. 1790.
p. 277.

A *Sumpsit* for money lent; and upon motion for a new trial, the case appeared to be this: One *Bellamy* gives his bill of exchange to *Newman*, payable to him or bearer on the 1st of *April* ensuing; before the 1st day of *April Newman* discounts the bill with the Governors of the Bank, who sent the bill after the day to *Bellamy*, and he acknowledged it, but it was not paid; on the 8th of *June* ensuing, before payment of the bill, *Bellamy* becomes insolvent; for which reason the Bank came upon *Newman*, and brought this action; and a verdict was found at *Guildhall* for the plaintiff. But the Court granted a new trial for two reasons; first, for that the Bank having discounted the bill with allowance, it was a purchase in them of the bill. (a) Secondly, the bill was not received at the day when the bill was good, and *Bellamy* solvent; which delay was Laches in the Bank. (1)

(a) 12 Mod.
517.
1 Ld. Raym. 744
1 Salk. 128.
2 Str. 1175.

(1) The jury found for the plaintiffs upon the new trial. 1 Ld. Raym. 442. S. C.

It is laid down by Lord *Holt* in this case, as reported by Lord *Raymond*, "That if a man has a bill payable to " to him or bearer, and he delivers it " over for money received, without

" indorsement of it, this is a plain sale
" of the bill; and he who sells it, does
" not become a new security. But if
" he had indorsed it, he had become a
" new security, and then he had been
" liable upon the indorsement." The
same rule is laid down in the case of
Hill v. Lewis. Skin. 411. Holt, 117.

D E

Term. Sanct. Trin.

11 Will. III. In B. R.

Iveson *vers.* Moor.

Case 38.

ACTION upon the case. The plaintiff declares that he was possessed of two coal mines in *B.* and had provided a large stock of coals, and the defendant *maliciose intendens proficuum carbonum præd' totaliter perdere & deprivare altam regiam viam per quam emptores carbonum in carbonar' præd' carriare præd' carbones ire & transire usi fuerunt cum lapidibus obstupavit, per quod* the plaintiff lost divers customers, who *carbones præd' emere voluerunt & præd' carbones multum damnificati & depretiati fuerunt ad damnum, &c.* Upon not guilty pleaded and a verdict for the plaintiff, it was moved in arrest of judgment, that the action was not well brought. And after argument at the bar, the case was solemnly argued by the Bench; and *Turton* and *Gould* Justices, were of opinion that judgment should go for the plaintiff, and it was granted by them, that for a general nuisance an action on the case lay not, but here is a special damage alledged. The only question is, whether this special damage is sufficiently alledged in that which follows the *per quod*, where it is not said what customers the plaintiff had in certain, or that he had any customers at all? And it was held by those two justices that the damages were well alledged after the *per quod, &c.* and that there was sufficient certainty, for there is no need of more

An action lieth not for a general nuisance where a particular damage to the plaintiff is not laid.

[This case is more fully reported in 1 *Ld. Raym.*

486.

3 *Ld. Raym.*

291.

1 *Salk.* 15. *S. C.*

Carth. 451. *S. C.*

Holt 10. *S. C.*

12 *Mod.* 262.

S. C. Comb. 480.

S. C.]

1 *Com. Dig.* 216.

3 *Bac. Abr.* 688.

Harg. Co. Litt.

56. a.

1 *Mod. Est.*

133.

IVESON v.
MOOR.

(a) 1 Ld. Raym.
493.

(b) 1 Ld. Raym.
491.

(c) Hob. 189.

(d) 2 Lev. 148.
1 Vent. 274.
3 Keb. 528. 531.

(e) p. 7. 44.
A verdict aids
many things not
expressed with
certainty.

1 Ld. Raym.
110. 491.

(f) 2 Keb. 480.
488. S. C.

Infra p. 342.

certainly than what is sufficient to shew that the plaintiff is damnified. In an action upon the case for diverting the water-course of a mill, *per quod proficuum molendini sui amisit*, (a) this sufficeth without an allegation that he had any customers who would have ground at his mill; and *Gould J.* took a diversity between such case where the damage accrues by one particular act, (for there it ought to be alledged with certainty) and where by divers acts, for in the last case there cannot be any such certainty; as here the plaintiff cannot well know what customers he loses, and perhaps did not know all his customers; and cited a case between *Baker and Moor*, (b) *Hil. 8 W. 3. rot. 316.* in *C. B.* where it was held that the plaintiff need not assign in certain what persons could not come to his house, for the plaintiff declared that he had a house and a way to it, which the defendant stopped up, *per quod* the people could not come to his house, &c. but for another reason, judgment in that case was given for the defendant; and he cited 2 *Jones 156.* (c) *Hob. 284. Cro. Car. 510.* And *Gould J.* was of opinion with the plaintiff for another reason, which was, because this action was against a wrong-doer, and compared this case to those of *St. John and Moody*, (d) and *Stroud and Birt.* (*Vide supra.*) (e) But if this declaration would not have been good upon demurrer, yet it was held by both of them that the verdict had aided it; and many cases were cited where a verdict had aided things not certainly expressed. *Allen 22. 1 Leon. 236. 1 Roll. 63. 1 Vent. 13.* (f) 2 *Vent. 114.* But by *Holt C. J.* and *Rokeby J.* judgment in this case ought not to be for the plaintiff, by reason that for a general nuisance an action upon the case lieth not, (as it is granted) and the offence here is a general nuisance; and, as *Holt C. J.* said, the offence being in the highway, that made it a general offence, and although the plaintiff inhabits near the highway, yet it does not give him a property in such way; and in all the cases where an action upon the case lieth the plaintiff hath a property, as in the action for diverting the water-course to a mill, the plaintiff had a property in the water-course; so in the case between *Baker and Moor*, that was a private way in which the plaintiff had right; and he cited

1 *Cro.*

Cro. Eliz. 664. (a) 2 *Saund.* 115. And *Rokeby* J. said the reasons why an action lieth not for a general nuisance are, first, because the King is intrusted with * the remedy for a general nuisance. Secondly, for the avoidance of multiplicity of suits. But it is objected that here is a special damage, which was denied by *Holt* and *Rokeby*, for the damage in general was done in the highway; and as the plaintiff sustained damage, all those who pass that way have damage also; the plaintiff may have more inconvenience, but hath no other damage but what is common to others. In an indictment for a nuisance in the highway, it is laid *ad commune nocumentum omnium per viam illam euntium & transuntium*; and the present case is, that the defendant had made an annoyance to all that pass in the way where he had thrown down his rubbish; the plaintiff hath not any particular damage. And *Holt* C. J. said, that the damage on which an action is founded in such a case, ought to be one peculiar and extraordinary damage. And *Rokeby* J. said, that it ought not only to import a damage but a tort also; and as to the case 27 *H.* 8. where a man had a house on the one side of the highway and land on the other side, and had not any passage from his house to his land, but only across the said highway, there the highway being stopped, *Fitzberbert* held that he might have an action, but *Baldwin* was of a contrary opinion; and *Holt* C. J. said, that the law hath been according to the opinion of *Baldwin* ever since, and denied the case 2 *Jones* 156. to be law as it is there reported; and these two Judges agreed that if an action were maintainable, the declaration here is not sufficient, for the damage ought to be certainly alledged, that the Court may judge in what the particular tort and damage consist; if the declaration had ended at *per quod*, it had not been sufficient, then the allegation afterwards is not sufficient, for the customers are uncertain and not known. And *Holt* C. J. denied the case 1 *Roll's Abr.* 63.

IVISON v.
Moor.

(a) 4 *Lev.* 27.
1 *Vent.* 167.
2 *Keb.* 631. 803.
822. 838. 850.
S. C.

[*60]

Case 39.

Juxon & Ux' *vers.* Naylor. In B. R.

Amendment,
where it shall be.

1 Sid. 304.

2 Salk. 700.

Latch. 11.

Barnes 407.

1 Rich. Pr. K.B.

300. 364.

1 Com. Dig. 46.

316.

1 Ld. Raym. 4-

2 Ld. Raym.

1557.

2 Burr. 967.

5 Burr. 2588.

1 Cromp. Pr. 365.

(a) Cro. Jac. 162. Yelv. 64. Moore 465. Hard. 321. *Infra* p. 282, 283.

A *Fieri facias* bore teste on a day out of term, and whether it was amendable, or not, was the question; and it was granted, that a writ of enquiry is amendable, *Godb.* 78. for there is the roll by which it may be amended; * so a *venire facias*, (a) *Uc.* for there is an award by which it may be amended, and in the present case the Court would amend the *fieri facias* if it could; but there is no award upon the roll for the *fieri facias* by which the amendment can be made. (1)

(1) The rule in this case appears cannot be amended. 1 Com. Dig. Tit. to be, that the process which has not Amendment, (c. 2.) 1 Term Rep. the roll for warranting the amendment, 783.

[*61]

Case 40.

The King *vers.* Harris. In B. R.

Restitution
ought to be made
immediately
upon a conviction
of a forcible
entry.

Carth. 496. S.C.

3 Salk. 313. S.C.

Holt 324. S.C.

5 Mod. 443. S.C.

72 Mod. 268.

S. C.

1 Ld. Raym.

440. 482. S. C.

(a) *Re-restitution.*

Quere 1 Ld.

Raym. 433.

A N indictment upon the statute of 8 H. 6. c. 9. for a forcible entry, was found before the justices of the peace, but no restitution was awarded at the time of the conviction, but at the end of two years and a half restitution of the possession upon this indictment was awarded to the party ousted; and now upon a motion (after deliberation) (a) *restitution* was granted by the whole Court; for as the indictment was found, restitution ought to have been awarded immediately, for the intent of the statute was to give a present remedy, and for that reason does not delay it till the quarter-sessions, but impowers a private justice to put the act in execution; but if he does not restore the party ousted, he does not put the act in execution as required. And Holt C. J. grounded his opinion upon 8 Co. 120. *Bonham's* case towards the end: if a man is imprisoned upon the statute of 14 H. 8. by the censors of the college of physicians, he ought to be committed immediately, and there it is said that the justices of the peace upon their view ought

ought to commit the offenders immediately, and for the same reason ought they upon 8 H. 6. to make restitution immediately. (1) The King v.
HARRIS.

(1) Holt C. J. said in this case that justices of the peace might remove the force upon their view, but they could not grant restitution. 1 Ld. Raym. 483. 3 Com. Dig. 364.

D E

Term. Sanct. Hil.

11 Will. III. In B. R.

Case 41.

Badge *versf.* Floyd.

A remainder limited to take effect, if and where former limitations cease is not contingent but vested.

1 Ld. Raym. 523. S. C.
 1 Salk. 232. S. C. Vin. Abr. tit. *Remainder*. (W) pl. 13.
 Moore 486.
 3 Co. 20. a.
 Raym. 427.
 Gilb. Eq. Rep. 36. 1 Eq. Abr. 195. S. C.
 1 Burr. 228.
 Fearn's C. R. 4th edition. 366. to p. 374.
 1 P.Wms. 170.
 T. Jones. 80.

THE case was this: *John Floyd* seised of the land in question in fee, upon the marriage of his son settles it to the use of himself for life, afterwards to the use of *John* his son for ninety-nine years, if he so long lived, afterwards to the first, second, third and fourth issue of *John* the son in tail mail; remainder to the heirs male of the body of *John* the son; remainder to *John* the father, and the heirs male of his body; remainder to the right heirs of *John* the father: afterwards *John Floyd* the father makes his will, and thereby devises, (he having issue *John* the son by one venter, and three sons by another venter, viz. *Thomas*, *Paul* and *Peter*,) that the same land, after the death of *John* his son without issue male, should go to *Thomas* his son, and the heirs male of his body; and if *Thomas* should die without heirs male of his body, to *Paul* and the heirs male of his body; and if *Paul* should die without heirs male of his body, his brothers then not being living, then to *Peter* and the heirs male of his body; then takes notice, that he would have the estate continue in his name and posterity; but if there should be no heirs male, then he limits it to the heirs female, &c. In the year 1669 *Paul* dies without issue; in the year 1674 *Thomas* dies and leaves issue, under whom the defendants claim; in the year 1679 *Peter* dies, having

BADER v.
FLOYD.

[63]

having issue the lessor of the plaintiff; in the year 1684 *John* dies without issue, but had first suffered a recovery to the same uses as are limited by the will; this seemed to be the effect and substance of the case; in which the question was between the son of *Peter*, the lessor of the plaintiff, and the assignees under *Thomas*. And *Holt* C. J. gave judgment for the plaintiff, and delivered the opinion of the whole court for the plaintiff. And the first question was, whether the remainder limited to *Peter* was a contingent remainder, or a remainder vested? if it were a contingent remainder, judgment would have been for the defendant. And it was objected from the bar, that the remainder to *Peter* was contingent, for that the words limit it to him after the death of *Paul* without issue male, his brothers then not being living; so that *Peter* was not to have the land if his brothers were living, when *Paul* died without issue. But the court held this to be a remainder vested; for the words [his brothers then not being living] are no more than a repetition of what was before expressed; the devise was to *Thomas* and the heirs male of his body, then to *Paul* and the heirs male of his body, then to *Peter* and the heirs male of his body; so that *Peter* could not take if his brothers were living, for *Thomas* and *Paul* must be dead before the estate could come to *Peter*; then though it be expressed in direct terms, that *Peter* shall not have the estate, but only after the death of *Paul* without issue, his brothers then not being living, which was implied, (for the estate of *Thomas* and *Paul* could not be determined during the time that they were living,) such expression or repetition of words which were contained in the prior limitations shall not make the remainder to *Peter* to be contingent; then suppose the remainder to *Peter* were upon a contingency, when *Paul* died without issue male, his brothers then not being living, the contingency would have happened, and the estate of *Peter* ought then to vest: but put the case, that *Thomas* had died leaving a son, and *Paul* had then died without issue, the brothers of *Peter* then not being living; if such construction be made, that the estate of *Peter* then would have vested, violence would be done to the first words of the will, which give an

BADGE V.
FLOYD.

[64]

estate to *Thomas* and the heirs male of his body; but the estate of *Thomas* did not determine during the life of his son, and yet the estate of *Peter* commenced in the life of the son of *Thomas*; if it was to commence when the contingency happened, so as to make the estate of *Peter* to commence upon a contingency, this would contradict the express limitation and words in the former part of the will. Besides, the intent of the testator appears to be, that the estate should continue in his name and posterity; and by such construction, as makes this to be a contingent remainder, it might happen that the heirs female, who are not of the name of the deviser, might inherit before the heirs male are extinct (for the limitation is to the heirs female in the last clause of the will): as put the case; *Peter* having a son and a daughter, *Paul* dies without issue, *Thomas* surviving, who afterwards dies without issue; here the contingency does not happen; for *Thomas* was alive when *Paul* died without issue, and so the limitation to *Peter* and his heirs male will never take effect, contrary to the express intent of the deviser. And *Holt C. J.* cited *Gro. Car.* 185. *Spalding and Spalding*, which is an express authority in point; there a man had three sons, and devised lands to *John* and the heirs of his body, after the death of *A.* and other lands to *William* and the heirs of his body, and other lands to *Thomas* and the heirs of his body; and if *John* died during the life of *A.* then his land to go to *William*, &c. *John* did die in the life-time of *A.* but left a son of his body; and it was resolved, that *William* should not have the land; because *John* did not die without issue; for by the limitations to the other sons it appears that the deviser intended an estate tail to all of them, and it was not to be construed a contingent remainder, or limitation to *John*, to abridge the express limitation to him of an estate-tail. So when a man devised his house after the death of his wife to his son, then as follows, "And if my three daughters, and either of them, over-live their mother and brother, and his heirs, then they to have it, and after them *J. W.* and *R. W.* &c. and whether this was a contingent estate, and whether it were performed, two of the daughters dying in the life-time of their brother, were the questions?

And

And it was resolved, that this was no limitation contingent, but shews when it shall commence. 2 Cro. 416. (a.)

Bridg. 24. S. C. 1 Roll. Abr. 836. 3 Bulst. 192. S. C. Moore 852. pl. 1164. Coa. Rem. 4th edit. p. 369. Infra p. 83. 325. 374.

BADGE v.
FLOYD.
(a) 1 Roll. Rep.
398. 436. S. C.
S. C. Fearn's

But an objection was made by *Wright* Serjeant, That here was an executory devise to *Thomas* and his heirs male, to commence after the death of *John* without issue male, and therefore it is void; for the limitation made by the testator is this, "After the death of my son *John* without heirs male of his body, I give the said lands to *Thomas* and the heirs male of his body, &c." so that *Thomas* could have no estate until *John* was dead without issue male. And it was agreed by the Court, that if a man seised in fee in possession devises his land to another after the death of *A.* without issue, it is a void devise; for the law will never expect such a remote contingency, as the death of another without issue, and therefore the devise upon such a contingency is void: but here is not an executory but a present devise; for *John Floyd* the father was seised in fee of the reversion after the death of *John* his son without issue male, which reversion he had power to dispose of by his will; then as he devised that to *Thomas*, and the heirs male of his body, after the death of *John* without issue male, such devise was an immediate devise, which was then vested in the devisee; and the words [after the death of my son *John* without heirs male of his body,] only shew when the devise shall take effect in possession. And he compared it to the case 10 Co. 107. a. A lease was made for ninety-nine years, if the lessee so long lived; and afterwards the lessor granted the land demised to another for life, *habendum* after the death, surrender or forfeiture of the lessee; this was adjudged a good grant for life, and the *habendum* only shewed when it was to come into possession. It was also objected by *Wright* Serjeant, that here *John Floyd* the father had but an estate tail, and so could not make a devise of it; for by the marriage settlement the estate was limited to *John* the elder for life, then to *John* the son for ninety-nine years determinable on his life, then to the first, second and third son of *John* the son in tail male;

[65]

If a man seised in fee in possession devise to another after the death of *A.* without issue it is a void devise on account of the remoteness of the contingency. 1 Ld. Raym. 506. 526. 1 Ven. 89. Forreft 1. Dougl. 3d. edit. 508. 1 Roll. Rep. 399. Cro. Jac. 416. 591. 1 Str. 428. infra, p. 233. 373. 1 Eq. Abr. 126. A devise by the reversioner to take effect after the death of tenant in tail without issue is an immediate vested devise of the reversion. 1 Ld. Raym. 525. S. C. 1 Salk. 233. S. C. 6 Co. 36. b. Cro. El. 323. 1 Saund. 151.

BADGE v.
FLOYD.

[66]

then to *John* the son and the heirs male of his body; remainder to *John* the father, and the heirs male of his body; remainder to the right heirs of *John* the father; so *John* the father was seised for life, with a remainder to him in tail male; the remainder to him in fee, and by consequence the devise made by him was void. And it was agreed by the court, that if *John* the father had no more than a remainder in fee, his devise would be void; for he would have given no estate by the will, but what the devisees would have had by force of the estate-tail; for upon the death of *John* the son without issue male, by force of the estate limited to *John* the father in tail male, the land would descend to *Thomas* and the heirs male of his body, then to *Paul* and the heirs male of his body, then to *Peter* and the heirs male of his body, in the same manner as it is devised to them, and afterwards to the heirs general of the devisor; then they would not have taken by the will, but by descent. But in this case *John* the father had not the fee in him by way of remainder, but it was in him as his old reversion; then as he devised that to *Thomas* and the heirs male of his body, *Thomas* had an estate-tail *hors* the reversion; for when a man creates an estate-tail, the tenant in tail holds of him in the reversion, who holdeth of the lord paramount; and therefore after this devise *John* the son should hold of *Thomas*, to whom the reversion was devised; and if the lord avow, he ought to avow upon *Thomas* as his true tenant, and not upon *John*; and for the reason, that the devisor had the reversion in him, and not the remainder, the devise is good. And this diversity between a reversion and remainder is agreed. 2 Co. 51. a. If there be tenant in tail, remainder in tail, and he in the remainder grants his estate during the life of the tenant in tail, the grant is void; for his grantee cannot have any benefit by it; but if there be tenant in tail, reversion in fee, and he in the reversion grants his estate during the life of the tenant in tail; this is good, for the grantee shall have the services which the tenant in tail ought to perform; but if the will could not stand with the rules of law, the recovery suffered by *John* the son being to the same

Where there is tenant in tail and remainder-man in tail, and the latter grants his estate during the life of the former, the grant is void. It is otherwise where there is tenant in tail and reversioner in fee and the latter grants his estate during the life of the former.

Yelv. 149. 1 Ry. 526. S. C. Salk. 233. 2. C.

uses

uses as the devise, will make the estate good to the lessor of the plaintiff. And therefore judgment was given for the plaintiff. (1)

BADGE v.
FLOYD

(1) Afterwards, upon error brought two judgments in Parliament; and in the Exchequer Chamber, this judgment was affirmed; and afterwards a judgment was affirmed there. - 1 Ld. writ of error was brought upon these Raym. 527.

Gage *versus* Acton. 9 Will. 3. In B. R. Case 42.

[67]

DE B T for rent against the defendant as administratrix due in the life-time of the intestate. The defendant pleaded, that the intestate in his life-time entered into an obligation to her of 2000*l.* when she was sole, which was not yet satisfied, and that she had not assets *præter*, &c. which she retained for the debt upon that obligation. And upon the whole the case appeared to be, that the intestate entered into an obligation to his wife *dum sola* in her own proper name; the condition of which was, that if the intestate, with whom a marriage was then intended by the defendant, should leave her worth at the time of his decease the sum of 1000*l.* in goods and chattels, or if his executors or administrators should pay her 1000*l.* within six months after his decease, then the obligation to be void. Afterwards the obligor and obligee intermarried, the husband died, and the wife took out administration; and to the action brought for rent on lease due from the intestate, the defendant pleaded retainer to satisfy this obligation. And the questions were two; First, Whether an administrator could plead a retainer for debt upon a bond to an action of debt for rent? Secondly, Whether the obligation was not discharged by the intermarriage of the obligor and the obligee?

A bond, given by an obligor who afterwards marries the obligee, the condition of which cannot be broken during coverture, is not extinguished by such intermarriage. 1 Freem. 512. 515. S. C. Carth. 511. S. C. 1 Salk. 125. S. C. Holt 309. S. C. 12 Mod. 288. S. C. Prec. Chan. 237. S. C. 2 Vern. 480. S. C. 1 Eq. Ab. 63. pl. 3. S. C. 1 Ld. Ray. 5. S. C. Baron and Feme 55. 1 Bac. Abr. 291. 1 Pow. on Cont. 314. 443. 1 Com. Dig. 552. Harg. Co. Litt. 264. b. n. 2. 2 P. Wms. 243. 2 Vern. 290. Lill. Ent. 213. Comb. 242. Skin. 409. Vin. Abr. Tit.

Baron and Feme (Q. 2.) pl. 15. Extinguishment (M) pl. 11. Release (U) pl. 23.

GAGE v.
ACTION.

A debt due for rent upon a lease (whether parol or by indenture) and a debt upon a bond are equal in degree.

Infra p. 145.
1 Raym. 515.
Lovelass 55.
2 Bac. Abr. 434.
Wentworth 146.
1 Com. Dig. 246.
12 Mod. 7.
Comb. 183, S. C.
1 Vern. 490.
Vin. Abr. Tit. Execution.
(Q. a.) pl. 26.
(S. a.) pl. 3.
1 Freem. 262.
(a) 3 Lev. 267.
4 Mod. 44.

[*68]

(b) Infra p. 145.

Marriage extinguishes all contracts for debts due *in futuro*, *in presenti* or upon a contingency which may become due during the coverture, otherwise where the debt cannot become due during the coverture.

As to the first question the whole Court agreed, that an executor or administrator might plead a retainer for satisfaction of a debt on bond to an action of debt for rent, for they are of equal degree; and then a man may retain for the satisfaction of a debt due to himself against another debt not being of an higher nature; and so *e contra*, a man may retain a debt due for rent against an action for a debt on bond; but the case of *Godfrey and Newport*, 2 Vent. 184. (a) is good law; for if an action be brought for rent due from a testator, the executor shall not plead a bond made by him not yet satisfied, nor *e contra*; for being of an equal degree, one cannot be a bar to the other; and in such case there is no difference between *rent due upon a lease by parol and a lease by indenture; for in both cases the rent is of the same quality, and the one may be retained against a debt due upon bond, as well as the other. [Vide the case *Paf. 5 Ann. in C. B. between Stonehouse and Ilford* accordant. (b)] As to the other point, it was resolved by *Turton and Gould* Justices, that the marriage in this case was not a discharge of the obligation. *Gould* J. admitted, that the feme before marriage might have released the obligation; and that by the marriage she made a release or extinguishment of all present contracts to be performed *in futuro*, *in presenti*, or upon a contingency: but they said, that here was not any thing to be performed during the coverture; and the obligation could not be sued during the coverture, then the marriage must be only a suspension, and not an extinguishment of the debt due by virtue of the obligation; for it does not become due till after the death of the husband; the condition is parcel of the obligation, and by the condition it appears, that nothing is due until after the death of the husband, and the obligation cannot be put in suit until the condition is broken. 28 H. 8. 31. Besides, here it was the express intent of the parties, that the obligation should be of force after the death of the husband; the marriage is mentioned in the condition, and *modus & conventio vincunt legem*. And this is not like the cases which make the marriage to be a release of a debt, and which are founded upon an absolute contract, for here the contract is qualified; and they relied upon the cases

26 H. 8. 7. *b.* If a man gives bond to his wife when sole, and they marry, and are afterwards divorced; debt lies after the divorce. (*a*) A man promises a woman, that if she survives him he will leave her 100 *l.* and afterwards they intermarry, and the wife survives; she shall recover in *assumpsit* against the executor of the husband, for the law will not make a release against the intent of the parties; and the marriage, which was the cause, does not destroy the promise created by it. *Hob.* 216. *Hutt.* 17. (*b*). And altho' *Hobart* differed in opinion, yet he agreed, that an obligation should be in the same case as a promise; and in case of such a promise, it was also resolved, that the marriage is not * a release; and this was affirmed in the Exchequer Chamber. 2 *Cro.* 571. (*c*) In every case marriage doth not release the action of the wife; (*d*) for if a man marries the executrix of the obligee, the action is only suspended, not released, for after the death of the husband it revives. But *Holt C. J.* *contra* strongly; who said, that the other judges termed this a qualified contract, plainly contradicting the text of *Littleton*, who says, that an obligation with a condition future is *debitum in presenti*, tho' payable at a future day, and may be released by the words "all demands"; and the words of the lien are in the present tense, *cognovit se teneri*, and not in the future, and for that reason the marriage is a release. For first, a man cannot be indebted to his wife. Secondly, As by the condition the payment is not required during the coverture, yet an obligor may pay before the condition is forfeited; and the husband in such a case might pay the penalty in discharge of his obligation before the day, but he cannot pay it to his wife. 11 H. 4. 40. Thirdly, Marriage is an actual payment; for if a stranger was bound to the woman, payment to her after coverture would not have been lawful payment, but it ought to have been made to the husband. Fourthly, The husband acquired it by the marriage; for if a stranger had been bound to the wife, the husband might have released it; and he said, that the cases cited do not warrant the contrary opinion; the marriage of the obligor with the executrix of the obligee is not a release, because she had it *in auter droit*, to the use of

the

GAGE &
ACTION.(a) *Dyer* 13. a.
1 *Ed. Raym.* 521.(b) 1 *Brownl.*
18, S. C.
Noy 26. S. C.
Godh. 271. S. C.
Hestl. 12.
Litt. Rep. 32.
S. C.(c) *Palm.* 99.
S. C.
2 *Roll. Rep.*
162. S. C.(d) 8 *Rep.* 136. a.
Hob. 10.
Harg. Co. Litt.
264. b.
Moore 236.
1 *Silk.* 306.

[*69]

GAGE v.
ACTON.

If A. has a term in right of his wife or as executor and purchases the reversion, it is no extinguishment because he possesses them in different rights. Harg. Co. Litt. 338. b.
1 Ld. Raym. 520.
1 Salk. 326.
S. C. Cro. Jac. 275. 1 Bult. 118. S. C.
Vin. Abr. Tit. Merger. (A. 2.) pl. 2.
Plowd. 418.
Where a right or duty may by possibility accrue to the wife during coverture, the baron may release it.
1 Salk. 326.
S. C.
Vin. Abr. Tit. Baron and Feme. (F.) pl. 50.
(Q. a.) pl. 4.

the testator; and for this reason, if a man possessed of a term either as executor, or in right of his wife, purchases the inheritance, the term is not merged; otherwise if he were possessed of the term in his own right. Where the man and his wife were divorced, as the case was 26 H. 8. the marriage was avoided; and he said, that he agreed to the cases 2 Cro. 571. Hob. 216. But there is as much difference between those and the present case, as there is between a condition precedent and subsequent; for though the promise is made *in presenti*, yet the action or the duty thereupon is future and contingent, and until a breach happens no action or duty arises; but in an obligation the lien or duty is immediate; and if such a promise had been made by a stranger, the husband could not have released it, for no possibility of a duty was accruant to the husband. But if the wife had a future right, which by possibility might happen during the coverture, there the husband might release, because of such a possibility; and as to what was advanced, that the intent of the parties was accordant, the intent of the parties ought not to change the efficacy of lawful acts; therefore he was of opinion for the plaintiff. But the other judges for the defendant. (1)

(1) A writ of error was brought in the Exchequer Chamber, but the plaintiff in error perceiving the Court inclined to affirm the judgment, did not proceed. Carth. 513.

D E

Termino Pasch.

12 Will. III. In B. R.

The King *verf.* The Inhabitants of Chalbury. Case 43.

UPON a *certiorari*, the case appeared to be this: an order was made for the removal of a pauper by two justices of *Warwickshire* to *Chalbury* in *Oxfordshire*, which parish did not appeal to the order, but obtained another order of two justices to remove the pauper from *Chalbury* to *Farringdon* in the county of *Berks*; and now it was moved to quash the second order. And *Holt C. J.* and *Gould* were of opinion that the second order was ill, as thereby the party was removed to a new parish; for *Chalbury* not appealing to the order made by the justices of *Warwickshire*, who sent the pauper to them as to the last place of settlement, is concluded from saying that *Farringdon* is the last place of settlement, for if it were, *Chalbury* would have the advantage of it upon the appeal. But *Turton* doubted, and it was adjourned.

Order of removal not appealed from conclusive to all the world. *Holt* 509. S. C. *Salk.* 481. 488. 489. 5 Mod. 163. 416.

Carth. 287, 288. *Foley* 273, 274.

Ashmead *verf.* Ranger. Trin. 11 W. 3. Case 44.
In B. R.

TRESPAS *quare clausum fregit & arbores succidit*. The defendant pleaded *son frank tenement*; the plaintiff replied that the land was copyhold granted to him and his heirs in fee; that by custom a copyholder shall have timber for repairs; that his tenement wanted to be repaired, and that

If a lord of a manor cut down trees where a copyholder may take them for repairs, trespass lieth. 1 *Ld. Raym.* 551. S. C.

Holt 162. S. C. 12 Mod. 378. S. C. 2 *Salk.* 638. S. C. *Fort.* 152. S. C. 13 Co. 67. *Brownl.* 328. S. C. 2 Com. Dig. 513. Vin. Abr. tit. Copyhold. (B. c.) pl. 10. (R. c. 3.) pl. 7. there

ASHMEAD v.
RANGER.

there was not sufficient timber for repairs. To which it was demurred; and *Northey* argued that the lord of a copyhold may cut down the trees without a custom allowing him so to do, for the copyholder is but a tenant at will, and cannot cut down trees but for necessary repairs, and consequently the lord may cut them down, otherwise nobody can have the benefit of them. But in this case where the copyholder by custom may fell for repairs, if the lord take so many trees as not to leave sufficient for repairs, perhaps an action on the case lies, but not trespass. But the Court thought that the lord could not without custom cut down the trees of his copyholder, and if he did so, trespass would lie against him for it. (1)

The lord cannot without a custom cut the trees of a copyholder.

1 Ld. Raym. 552.

(1) Afterwards error was brought upon this judgment in the Exchequer Chamber, and the judgment was affirmed there. And afterwards error was brought in Parliament, and both judgments were reversed *Monday 28th of April, 1702*, ten lords being affirming and eleven for reversing. 1 Ld. Raym. 552. 2 Salk. 638.

Cafe 45.

Clarke *vers.* Smith. In C. B.

Where the same estate is devised to a man which he would have taken by descent, he shall be in by descent, notwithstanding the possibility of a charge.

Nelf. Lutw.

244. S. C.

1 Salk. 241.

S. C.

2 Black. Com.

242. 2 Atk. 290.

Harg. Co. Litt.

12. b. n. 2.

1 Black. Rep.

22. 2 Str. 1210.

S. C. Hob. 30.

1 Ld. Raym. 728.

2 Ld. Raym. 829.

3 Lev. 127.

Infra p. 253.

3 Com. Dig.

19. 2 Bac. Abt.

15. 1 Str. 490.

2 Mod. 23. S. C. Cro. Eliz. 920. Moore 644. pl. 891. S. C. Noy 51. S. C. Vaugh. 271. Vin. Abr. tit. Descent. (J.) pl. 45. Devise. (P. c.) pl. 14. Heir (W.) pl. 12. Pow. on Devise: 434.

Ejectment. Upon not guilty pleaded, a special verdict was found to this effect. A man seised in fee devised land to his wife for life, and after her decease to his next heir at law and to his or her heirs; provided such heir should pay 100 l. to such person or persons as his wife by will or other legal writing should appoint, and his land should stand charged with the said 100 l. The deviser dies, and left a daughter who had one son and died. The wife dies without making any appointment to whom the 100 l. should be paid; the son of the daughter enters and dies without issue; and the dispute was between the heir maternal of the son who brought the ejectment and the heir paternal who was the defendant (the son being dead without issue); therefore whether the son took by the will [*i. e.* by purchase] or by descent, was the question. And it was resolved by the whole Court, that judgment should be for the plaintiff, for the heir took by descent,

and

and not by the will; and it would be mischievous if every little legacy should alter the course of descent, upon which the heir might plead to the obligation of his ancestor *riens per descent*; and here the legatee would have had no prejudice, and the land was charged in the same manner as if construction were to be made that the heir should take by purchase, and the legatee would have the same remedy in chancery. And *Treby* Chief Justice said that this proviso makes neither a condition nor a limitation; not a condition, for the devise is to the heir; not a limitation, for the wife might make an appointment to a person not capable, and the intent was not that such person should have the land, for it is devised to the heir; and 'this resolution is warranted' by the cases. 1 *Roll.* 626. 3 *Leon.* 64. And *Gilpin's case* 1 *Cre.* 161. that if a man devises land to his heir in fee upon a condition, his heir shall take by purchase; and the opinion 2 *Mod. Rep.* (a) by two judges, that if a man devises land to his heir, paying 20*l.* the heir shall take by the will and not by descent, are unintelligible and ill reported. For if a man devises land to his heir charged with a rent issuing out of it, the son shall take by descent. Judgment for the plaintiff. (1)

CLARK &
SMITH.

[73]

(a) 2 *Mot.*
286.
1 *Freem.* 248.
S. C.
Pow. on Dev.
438.

(1) Lord Holt in the case of *Emerson v. Inchbird*, lays down the rule upon this subject in the following words, "The difference is, where the devise makes an alteration of the limitation of the estate, from that which the law would make by descent; and

"where the devise conveys the same estate, as the law would make by descent, but charges it with incumbrances. In the former case the heir takes by purchase, in the latter by descent." 1 *Ld. Raym.* 728.

Term. Sanct. Trin.

12 Will. III. In B. R.

Case 46.

(1) Anonymous.

Plaintiff ought to pay the costs of one nonsuit only, where a *latitas* was awarded against four defendants, though they appeared severally by different attornies, where the nonsuit was for not declaring against them in two terms. Salk. 455. S. C. 7 Mod. 32. 3 Bac. Abr. 671.

A *Latitas* was awarded against four defendants, who were arrested thereupon, and gave their appearances severally by different attornies, and afterwards the plaintiff was nonsuited by every one of them severally, for not declaring against them in two terms, and 30 s. costs awarded to every one of the four defendants; but it was held ill: for by *Holt* C. J. though the plaintiff might declare against them severally, yet as the writ was awarded against them jointly, and the plaintiff was nonsuited before any declaration, there ought to be but one nonsuit for all of them.

1 Rich. Pr. K. B. 201. 12 Mod. 526. 1 Crompt. Pr. 122.

(1) This case is known by the name of *Allington v. Favafer*.

Case 47.

Day *vers.* Snelgrove. In B. R.

Prohibition shall go to the admiralty in a suit for the wages of a master of a ship. 1 Com. Dig. 273. 2 Str. 937. 2 Barn. 160. S. C.

A Prohibition to the admiralty was moved for, for that the libel there was against a ship for wages due to the master; and it was suggested, that the wages of the master accrue upon a contract within land. *Northey contra*; that the master is but a mariner, and the ship is liable for his wages; and that no prohibition will lie for them in the case;

2 Keb. 226. S. C. 1 Bac. Abr. 637. 1 Salk. 33. 12 Mod. 405. S. C. Holt 595. S. C. 1 Ld. Raym. 576. S. C. Carth. 518. S. C. 2 Str. 858. 2 Ld. Raym. 1452.

of

of a master, no more than in the case of the mariners; at least the party who prays a prohibition shall be compelled to give special bail to the action here. But the Court thought that a prohibition should go; for a libel there is allowable for the wages of the mariners only, and not of the master. *Raym.* 3. And if a prohibition ought to be granted *ex debito iustitie*, the Court will not compel the party to find special bail, if it is not consented to.

DAT W.
SNELGROVE.

[75]

1 Vent. 146.
343.
3 Lev. 60.
6 Mod. 238.

Presgrave versf. — In B. R.

Case 48.

IN an information or action upon a penal statute, brought by a person *qui tam*, &c. the defendant need not find special bail, if it is not upon the statute of 11 & 12 W. 3. *cap.* 10. *sec.* 20. for an offence in the exportation of wool; and then not only the penalty, but the cause of action ought to appear in the writ, and the defendant ought not to be arrested upon a general *latitat* with an *ac etiam billa*, &c.

Special bail need not be given in an information or action *qui tam* on a penal statute.
1 Com. Dig. 481.
2 Str. 1079.
1 Rich. Fr. K. B. 118.
1 Crompt. Pr. 29.
Yelv. 53. 18
Tidd's Fr. 240.

Mod. 231. 1 Bac. Abr. 210. Gilb. Hist. C. P. 37.

Gregory versf. Walcup. In B. R.

Case 49.

THIS was an action upon a bill of exchange; and the plaintiff declared, that one *Milburn* drew a bill of exchange upon *George Walcup* in *London*, to be paid to the plaintiff's order at double usance at *Amsterdam*, (and the bill was dated on the 26th of *October* 1699. and by that the double usance expired on the 26th of *December*, and by the custom of merchants the person upon whom a bill is drawn hath three days of grace for the payment in *England*, and eight days of grace in *Holland*). The bill was tendered to *Walcup* on the 30th of *December*, who accepted it, by which he became liable; & *super hoc præd* (the defendant) *eisdem die & anno super se assumpti quod ipse præd* denarios in eadem *billa content* eidem *G. bene solvere & contentare vellet secundum tenorem & effectum billa præd*. And it was moved that this was ill by *Sir Barth. Shower* and *Dee*; for the bill was not tendered or accepted until the 30th of *December*, which was the last day for the payment; then as the defendant promised (as it was alledged) on

An acceptance to pay a Bill of Exchange according to the tenor made after the time appointed for its payment, is a general acceptance to pay upon demand.
1 Ld. Raym. 574. S. C.
1 Salk. 129. S. C.
12 Mod. 470. S. C.
1 Salk. 127.
1 Ld. Raym. 364. S. C.
12 Mod. 211. S. C.
Carth. 459. S. C.

GREGORY v.
WALCUP.

[76]

Acceptance
after the time
of payment e-
lapsed is good.
4 Term Rep.
337.

Vin. Abr. Tit.
Bills of Exch.
(O.) pl. 39.

1 Com. Dig.
134.
12 Mod. 410.
1 Ld. Raym. 575.
Lutw. 899.
3 Barr. 1672.
1674. 3 Bac.
Abr. 608.
(a) 2 Show. 8.
Comb. 401.
10 Mod. 286.
Bull. Ni. Pri.
edit. 1790.
p. 273.

the same day, according to the effect of the bill, it was a thing impossible; for the payment was to be at *Amsterdam*, which could not be on the same day, and therefore the plaintiff had not declared well; for he ought to have said, that by the custom of merchants, if a bill was accepted, the acceptor obliged himself to make payment to the person who tendered it, &c. And Sir *Barth. Shower* said, that it was proved at the trial by a publick notary, that if a man accepts a bill payable at *Amsterdam*, he ought to assign a house where the money ought to be paid, otherwise it is not a good acceptance, but the bill may be protested; and if this bill had been tendered within the term of the double usance, and no house for the payment at *Amsterdam* assigned, it might have been protested; but after the usances were expired, he doubted whether such protests could be made. But it was said on the other side, and resolved by the Court, that judgment should be for the plaintiff; for the allegation of any promise for payment was not needful, for the acceptance is an actual assumption, and the declaration need not alledge more; and altho' some house where the money ought to be paid at *Amsterdam* should be named, otherwise the party may protest the bill, yet if it is accepted, the acceptor becomes liable thereby.

And *Holt* C. J. said, that if a bill of exchange is drawn upon a man, who refuses it, a stranger may accept it, for the honour of the drawer, and by such acceptance he becomes liable.

(a) And it was agreed in the same case, that a bill of exchange, payable to the order of a person, shall be paid to him or his order, for it is tantamount.

Case 59.

*Dr. Groenvelt vers. Dr. Burwell and others,
Censors of the College of Physicians.*

Power of the
censors of the
college of phy-
sicians.

THIS was an action of trespass for an assault, battery, wounding and false imprisonment.

1 Ld. Raym. 213. 252. 454. S. C. Pleadings. 3 Ld. Raym. 278. 1 Salk. 144. 200. 263. 396.
3 Salk. 265. 354. S. C. Holt 184. 395. 536. S. C. 12 Mod. 119. 145. 386. S. C. Carth. 421.
491. S. C.

The

GROENVELT
v. BURWELL
and others.

[77]

The defendants, as to the beating and wounding, plead not guilty, and as to the residue of the trespasss they justify; for that by letters patent dated the 23d of September 10 H. 8. the king granted, that they, viz. the doctors of physick in London, should be a body and perpetual community, *per nomen præfidentis & collegii sive communitat' facultat' medicin' London', &c.* and that they might make By-Laws; *& quod quatuor singulis annis eligerentur qui haberent scrutinium, correctionem & gubernationem omnium & singulorum dicta civitatis medicorum & aliorum medicorum forinsecorum facultate illa utentium infra eandem civitatem & suburbia, ac infra septem milliaria in circuitu ejusdem, ac punitionem eorundem pro delictis suis in non bene exercendo, &c. per fines, amerciamenta & imprisonamentum corporum suorum;* and that these letters patent were confirmed by an act of parliament of 14 H. 8. And that on the 1st of January 8 Will. 3. the plaintiff exercised the art of physick in London, and that he administered bad and unwholesome physick to one woman, and that the said woman and her husband complained to the defendants, being then the censors of the said college; upon which complaint the plaintiff was summoned before them, and upon examination they found him guilty of administering unwholesome physick, by means of which the said woman languished; and thereupon they fined the plaintiff 20*l.* and made a warrant under their hands and seals to ——— who was also a defendant, to take the plaintiff; who took him pursuant to such warrant, and conveyed him to prison; which is the residue of the trespasss of which the plaintiff complains. The plaintiff replies *protestando*, that there are no such letters patent, and no such act of parliament; and *protestando*, that the plaintiff did not administer such unwholesome physick; that the defendants of their own wrong committed the trespasss; *absque hoc quod*, that the plaintiff was taken and committed by force of the said warrant: and to this it was demurred. And this case was divers times argued, and many exceptions were taken to the plea and to the replication; and now this term judgment was given for the defendants. And Holt C. J. delivered the opinion of the court; and said, that the rest of the Judges were agreed, that the replication of the plaintiff was ill, and that the plea of the defendants was good. The plaintiff in his replication traverses the taking by the warrant mentioned in the plea of the defendants; and this is ill both in substance

GROENVELT
v. BURWELL
and others.

Where there
are two warrants
the one lawful,
and the other
unlawful, and the
party is taken
upon the illegal
one, the bailiff
may justify
himself by the
authority of the
legal warrant,
and to traverse
it is ill.

A man who
distraints for one
cause may avow
the taking for
another.

1 Ld. Raym. 466.
Godb. 110.

a Leon 196.

and in form; for in point of form he ought not to traverse the taking by force of the warrant, but that there was not any such warrant; for if it were necessary that the arrest of the plaintiff should be by the same warrant that was mentioned before in the pleading, then, if the defendants had shewn in their plea another warrant than that which was shewn at the time of the arrest, the plaintiff ought not to have said, that he was not taken by this warrant, but that there was not any such warrant. But the replication is not good in point of substance; for the plaintiff seems to intend, that the warrant by which he was arrested was not a good warrant, for which reason he would take advantage of it: but admitting that the warrant upon which the plaintiff was arrested was unlawful, yet the plaintiff shall not have advantage of it, if there was another warrant which was lawful to take him at the same time; for if there are two warrants, the one lawful, and the other unlawful, and the party is taken upon the illegal warrant, yet he who apprehends him may justify himself by the authority of the legal warrant; and this appears by the case *Mich. 34 Ed. 1. Fitz. Avovery*, 232. cited 3 Co. 26. a. If a man takes a distress for a thing for which he had not good cause of distress, but had good cause of distress for another thing; if a replevin is brought, and he comes into court, he may avow for which thing he pleases.

Then it was considered, whether the plea of the defendants was good; to which it had been objected that it was ill for the uncertainty; for the cause of the commitment being traversable ought to be alledged with certainty. Secondly, That by the plea it appears, that the plaintiff was fined and imprisoned also; the censors [of the college of physicians the defendants,] have authority to impose a fine, and to imprison for non-payment of that fine, or they may imprison for the offence; but they cannot both fine and imprison for the same offence, as in this case; for it does not appear that the imprisonment was for non-payment of the fine, but the plaintiff was both fined and imprisoned, and so was twice punished for one offence. Thirdly, The plea does not shew that the plaintiff was one of the college. Fourthly, The plea makes no answer to the assault; it does not shew that there was any assault, or set forth any justification of it.

But

But *Holt* C. J. said, that the Court held the plea to be good, for it goes to the whole declaration; as to the battery and wounding the defendants plead not guilty, as to the residue of the trespasss they justify; and the residue of the trespasss comprehends the assault, and every other part of the declaration to which the plea (of not guilty) does not extend: and there is no need that the plaintiff should be of the college; for it appears that he exercised his faculty within *London* and the censors have jurisdiction within *London* and the suburbs, and seven miles in circumference; and it appears by the words of the charter, that the censors have power to punish by fine and imprisonment; and how they exercise that authority we do not enquire, as it will be apparent afterwards in the answer to the first objection, and which is the most material one. In answer to the first objection, then, we say, First, that the cause of the commitment is not traversable. Secondly, if it were traversable, it is set forth with certainty enough. That the cause of commitment is not traversable appears by the authority which the censors have by the act of parliament; for by it they are constituted judges of fact, what is a mal-administration [of medicines] and what is not: and they are judges of record, for they have authority to impose fine and imprisonment; and when a new authority is constituted, with power to fine and imprison, the persons invested with such authority are judges of record; for that very thing proves a court to be a court of record, viz. the power of fining or imprisoning; for courts which are not of record can neither set a fine nor commit any one to prison. 8 Co. 38. b. And there it is proved, that the leet can impose a fine, because it is a court of record; and forasmuch as the statute *W. 2. c. 11.* impowers the auditors to commit the accountant to prison, the auditors are thereby made judges of record; as is observed 10 Co. 103. a. 2 Inst. 218. Then the censors being constituted judges of the matter, that which they have done as such they shall not be answerable for; and that a judge shall not be answerable for an act done by him as a judge, appears by 12 Co. 24. and the cases there cited. True it is, that if a justice of (a) peace issue his warrant to imprison the party, or to arrest him until such time as he can be brought before him, or if the commis-

GROENVELT
v. BURWELL
and others.

When a new authority is constituted with power to fine and imprison, the persons invested with such authority are judges of record, for none but courts of record can either fine or imprison. 3 Bl. Com. 243. 25. 8 Co. 41. a. 60. b. 120. a. 30 Co. 103. a. 11 Co. 43. b. 2 Hawk P. C. 5. 2 Bl. Rep. 1146. 2 Mod. 218. 1 Salk. 200. Far. 128. A judge is not answerable for any act he do as judge. 1 Hawk. P. C. 350. 2 Hawk. P. C. 6.

13 Co. 24. b. 3 Bl. Rep. 1145. 1 Salk. 397.

(a) 2 Bl. Rep. 1147. 2 Burr. 583

GEORNEVELT
v. BURWELL
and others.

(a) Vide St. 1
Jac. 1. c. 15.
Sec. 8.
(b) 2 Bl. Rep.
1145.
1 Ld. Raym.
580.

From a court
newly erected
with power to
proceed in a
summary way,
different from
that prescribed
by the common
law, no writ of
error lies.

1 Ray. 469.
5 Com. Dig.
289. but a
Certiorari or a
Mandamus lie.
1 Ld. Raym.
580. Cowp.
524. Raym.
433. 1 Bl. Rep.
233. 2 Burr.
1040. S. C.
2 Hawk. P. C.
405. Doug.
(1) 548.

2 Com. Dig. 16. 1 Bac. Abr. 349. 1 Salk. 144. 2 Bac. Abr. 194.

sioners of bankrupts commit a witness for refusing to be examined, (a) it may be determined in an action, whether they have pursued their authority or not; for their act in this respect is only ministerial; (b) and the commitment is not intended as a punishment, but only as a mesne process to bring the party to justice, or to make him do his duty. My Lord Coke, it is true, says in Dr. Bonham's case, 8 Co. 121. a. that the cause of commitment was traversable; but this opinion was there given *obiter*, and was not essential to the case in judgment; for there the question was, for practising without the licence of the college, for which the party could not be imprisoned; and Dr. Bonham being a graduate in the university, my Lord Coke was carried away by his affection to his *Alma Mater* so far as to make a resolution in the present point, which was not in the case before him: but my Lord Coke says, that upon a conviction by the censors, they ought to make a record of it, which admits that they are judges of record; and then by his own rule there in the case of a justice of peace who made a conviction of a force, and the cases in his other works, their acts [the acts of the justices of the peace] cannot be traversed; and my Lord Coke does not cite any authority in support of his opinion [as to the point now before us]. The reason which he gives why the party has no remedy by writ of error or otherwise, is of no weight: I grant that a writ of error lies not; for the censors having a new authority by a special act of parliament, and their proceedings being directed to be in a summary way, there is no need for them to pursue the forms and methods of other courts; and it is sufficient for them to make such summary proceeding as justices of the peace in many cases may do; yet the party is not without remedy; for he may have a *Certiorari* to remove the record of conviction, and then it may be examined and reviewed, to see whether it be pursuant to their authority; for in every case, where a new jurisdiction is set up for

(1) The third edition of *Douglas's Reports* is quoted throughout this work.

a special purpose, this court by virtue of its original power may award a *Mandamus* to make them put their authority in execution, and a *Certiorari* to look into their proceeding, whether it be conformable to their authority, or not. Thus a *Certiorari* lies to remove an indictment for felony before the justices of peace (*Cro. Eliz.* 489. *Long's case*), to remove orders before commissioners of sewers, or by justices of the peace who have authority to make conviction of a force in their presence, or for deer-stealing; but although no *Certiorari* did lie (in the present case) it is not consequential that the cause of their commitment is traversable; for if the parliament intrusts them with a power so great that no act of theirs shall be reversed or reviewed, there is the less reason that their proceeding should be examined or traversed in an action; a jury is not finable for giving a verdict against evidence; and though there are many cases where jurymen have been fined, (1) yet *Busbel's case*, in which all the others are cited, is sufficient to controul all the rest. *Vaug.* 135. (a) And if a juror shall not be fined or imprisoned or otherwise punished, for refusing to find a man guilty upon apparent and plain evidence, much less shall a judge be liable to censure. In the case (b) of *Hammond and Powel*, P. 29 Car. 2. an action for false imprisonment was brought after the resolution in *Busbel's case* for his imprisonment, (for *Hammond* was one of the same jury with *Busbel*, and fined 40 l. and imprisoned for it at the same time,) and notwithstanding that the fine and imprisonment were illegal, yet it was adjudged that the action did not lie for false imprisonment against the judge or the officer; so a fine imposed by a judge of a court is not traversable as an amercement is. 7 H. 6. 13. a. As to the case between *Terry and Huntington Hard*. 480. which may be objected; that is good law; for there an action was brought against the commissioners of excise, who had charged a man for the duty upon strong waters, where the liquor made by him was low wine of the first extraction, and the action well lay, for they had exceeded their jurisdiction; for low wines of the first extraction were not chargeable within the act of parliament; and as they had charged a duty upon a liquor not chargeable with it, they were not to be excused for having named it

GODENVELT
v. BURWELL
and others,

[81]

A jury is not
finable for
giving a verdict
against evidence.

(a) 3 Keb. 358.
1 Freem. 1.
2 Jones 13.
1 Mod. 119.
S. C.

(b) 1 Mod. 184.
2 Mod. 218.

(1) Moore 730. Yelv. 23. 1 Leon 132. Noy 43.

GEORNVVELT
v. BURWELL
and others.

[82]

(a) 1 June
355. S. C.
2 Roll. Abr.
560.

strong waters. If a justice of peace commits a man irregularly for being the father of a bastard child, no action lies against the justice if the man was the father of a bastard, otherwise if he had no bastard at all. So the case between *Nichols* and *Walker, Cro. Car.* 394, (a) is good law, for there an inhabitant of *Tottridge* was charged to the poor of *Hatfield*; and the justices of peace have power to award a distress, where a person is assessed to the poor of the parish where he hath land or is an inhabitant; but where he is charged to the relief of another parish, there the case is beyond their jurisdiction. But if the cause of the commitment were traversable, yet the plea of the defendants here is good, for it shews with certainty in what the ill administration of the physic consisted, viz. in the use of unwholesome drugs: and although it is not said what drugs he used, it is no matter, for how shall we be informed whether he hath shewn them. In an action against a surgeon for an inartificial cure, the plaintiff does not shew what plaisters the defendant used. As to what hath been said, that the plea doth not shew for what malady the medicines were given; it was answered, that it would be so much the worse if the medicines were given when the party had not any malady at all. And although it is not said that the witnesses upon whose testimony the fine was imposed were upon oath, yet the plea is sufficient; for it may be that it was not necessary that they should be sworn, or if it were needful, the omission of it is not such as will make their proceeding void. In such a special jurisdiction, in which the proceeding is to be in a summary manner, it is not needful to observe all the circumstances which are necessary in other legal proceedings. Judgment for the defendants.

Case 51.

Nottingham *vers.* Jennings. In B. R.

A devise by a
father to his se-
cond son and
his heirs for

THIS was an action of ejectment. And upon a special verdict, the case appeared to be as follows:

ever, and for want of such heirs, then to the right heirs of the testator, is an estate tail. 1 Ld. Raym. 568. S. C. 1 P. Wms. 23. S. C. 1 Salk. 233. S. C. 2 Eq. Abr. 308. pl. 10. S. C. 3 Mod. 123. Bridgm. 135. 1 Ld. Raym. 623. Forr. 1. Doug. 266. Cowp. 234. 3 Term Rep. 145. 2 Bac. Abr. 52. 3 Com. Dig. 27. Infra p. 539. 544.

A man seised of land in fee had issue three sons, *John*, *Francis* and *William*; and devises his land to *Francis* and his heirs,

heirs, and for default of heirs of *Francis* to the heirs of the devisor; and whether *Francis* had a fee-simple or an estate-tail, was the question; which *Holt* C. J. who tried the cause, directed to be brought before the Court in respect of the case of *Hearn and Allen*, *Cro. Car.* 57. (a) And it was objected by Mr. *Cartbew*, that this case is stronger than the case of *Hearn and Allen*, and differs from the case of *Webb and Herring*, 2 *Cro.* 415. (b) for in the present case after the devise to *Francis* there is no devise at all, for the limitation to the heirs of the devisor makes no devise to any person certain; for if it be intended that the eldest son were designed under the words [heirs of the devisor], yet the eldest son shall take nothing, for he takes by descent. But it was answered by *Northey*, and resolved by the Court, that the devise to *Francis* gives only an estate-tail. And *Holt* C. J. said, that such was the case of *Hearn and Allen*, which differs not from the present case, and if that case is good law, the devise here must give a fee-simple; but he was of opinion that the authority of that case was not great, being only upon the opinion of three judges against two, and it was contradicted by the case 2 *Cro.* 415. of *Webb and Herring*, which was stronger than the other; and that although the devise to the right heirs of the devisor passes no estate to the eldest son, who takes the reversion by descent, and not the remainder by purchase; yet it is sufficient to shew the intent of the devisor, that the words of the devise "To *Francis* and his heirs, and for want of such heirs", meant heirs of his body. And as the devisor says, that his own right heir shall take after the death of *Francis* without heirs, although the devisor's right heir takes nothing by this devise (for he takes by descent); yet it appears that the testator intended that when *Francis* was dead without issue, the eldest son should take, and the word *heirs* cannot have any other construction but issue, because he could not die without an heir as long as the testator had an heir; and for that this case differs from the case where the limitation for default of heirs is made to a stranger, (this being made to one who is the heir of the devisor) judgment shall be for the plaintiff, who claimed under the right heir of the devisor. (1)

NOTTINGHAM
JENNINGS.

[83]

(a) Hutton 85.
S. C.
Vaugh. 269.

(b) 1 Rol. Rep.
398. 436.
Bridg. 34.
2 Bull. 192.
Moor 852.
Cro. Jac. 448.
1 Lev. 71.
Supra p. 54.
Infra p. 325.
374.

A limitation which passes nothing, as in the present case, may explain the intention of the testator respecting other clauses.
Cro. Jac. 695.
1 Ld. Raym.
570.

Had the devise over been to a stranger, the second son would have taken a fee-simple, and consequently the devise over had been void.

2 P. Wms. 370. 2 Eq. Abr. 305. pl. 2. Vaugh. 270. 1 Ves. 89. Forr. 2. 3 Com. Dig. 27.

(1) The law upon this subject is well laid down in the case of *Morgan* versus *Griffiths*, Cowp. 235. in the following words: "Where one devises

[84]
Cafe 52.

Parker *vers.* Keck. In B. R.

A surrender of a copyhold to the deputy of a deputy steward out of court, is good. 1 Ld. Raym. 658. S. C. 1 Salk. 95. S. C. 3 Salk. 124. S. C. Hult 221. S. C. 12 Mod. 466. S. C. 2 Cum. Dig. 489. 1 Bac. Abr. 478. 1 Leon. 228. Cro. Jac. 526. *Infra* p. 152. 1 H. Bl. Rep. 163.

(a) 9 Co. 46. b. 2 Brownl. 330. S. C. 4 Leon. 243. S. C.

(b) Noy 55. S. C.

Where there are joint stewards and a surrender is taken by one of them it is good. 2 Cum. Dig. 489.

THIS was an action of ejectment. In which upon a special verdict the case appeared to be as followeth :

A man surrenders his copyhold to the use of his will, (and this surrender was made out of court into the hands of a person who had a deputation *pro hac vice* from the deputy of Sir Samuel Keck, who was the steward of the manor) and afterwards makes his will, and devises this copyhold to his wife for life, &c. and whether this surrender to the use of his will, made to the deputy of a deputy steward out of court was good, was the question between the defendant, who was the devisee, and the heir at law, who was the lessor of the plaintiff. And it was urged by Mr. *Weld* for the plaintiff, that the deputy of a deputy had not any authority; for although a steward may make a deputy (the which point may be disputed since the case of the Earl of *Shrewsbury*) (a) yet a deputation made by such a deputy is void, [which was granted by *Northey* on the other side]. Then the question is, whether the act of one who had not any authority shall be to the prejudice of a copyholder? and for this purpose he took a diversity between an act done by a man at the place of office, and an act done by a man in another place, and therefore agreed to the case, *Cro. Eliz.* 533. (b) where an agreement at the custom-house for merchandize imported with the deputy of a deputy was sufficient, because it was made at the custom-house with one who officiated there. So if there are joint stewards by patent, and one of them holds the court and takes surrenders, &c. it is good; or where the clerk of a steward holds the court, &c. it

to *A.* and his heirs generally, which would convey a fee, yet if there be a remainder over, for want or upon failure of such heirs, to a person who might take the estate as heir; the word heirs is retained to heirs of the body, and consequently *A.* has only an estate tail by such devise. It was determined

in the case of *Lee versus Brace*, reported in 1 Ray. 101. 5 Mod. 266. 12 Mod. 101. Carth. 343. 3 Salk. 337. Holt 668. That a limitation to a man, and his heirs even in a deed, may be so explained as to pass only an estate tail. *Infra* p. 540.

it is good, *Moore* 112. for the acts are done in court, where the tenants are compellable to come and perform their services, and cannot examine the authority of the steward; but when a surrender is made out of court, the surrenderor takes upon himself the notice of the authority of the person who takes the surrender, and if he hath not any authority it shall be at the surrenderor's peril; and if a surrender is made to a sub-deputy, it is of no more effect than if it had been made to a mere stranger. And he said that of common right a man may make a surrender to the lord or his steward, and such act as the lord or his steward can do of right, he can do by attorney; according to the rule laid down, 9 *Co.* 75. *Comb's* case. A copyholder may make a surrender in court by attorney, so the lord or his steward may accept a surrender by deputy, who is *quasi* an attorney to the steward; but a surrender out of court cannot be made by attorney without a special custom, nor for the same reason can it be made out of court to a deputy steward without a custom to warrant it. *Northey* on the other side said, that the place where the surrender is taken makes no diversity, for the thing to be considered is, whether it turns to the prejudice of the lord, or not. A grant by a disseisor, or of one who hath not any right, is good upon a surrender, for the disseisee hath not any prejudice thereby; but voluntary grants [of a disseisor, &c.] are not good; so in the present case the lord hath not any disadvantage whether the surrender be made to the steward or his deputy, in court or out of court; and therefore the act of such deputy or of his sub-deputy shall not turn to the prejudice of the tenant; and there is no colour for a difference, be the act done in court or out of court, [though in the present case the surrender was taken within the manor, and the coming of a copyholder to make a surrender, makes *quasi* a court]. And therefore he took the case *Cro. Eliz.* 533. to be a case in point, and the Court inclined to be of the same opinion; *sed adjournatur*. And afterwards it was resolved that the surrender was good.

PARKER v.
KECK.

[85]

A copyholder
may make sur-
render in court
by attorney.
2 Com. Dig.
495.
1 Bac. Ab.
462.

Cafe 53. The King *verf.* the Inhabitants of ———.
In B. R.

Order of justices
to remove a man
and his family is
ill, on account
of uncertainty.
Carth. 449.
Foley's Poor
Laws, 278.
2 Salk. 482.
485.
7 Mod. 54.
Comb. 478.

AN order of two justices made for the removal of a man and his children, and removed hither by *certiorari*, was quashed; for the removal of a man and his family hath been adjudged uncertain, for the family may comprehend those who having another settlement ought not to be sent to the place where the master of it is settled; so in the present case the children ought to be removed to the place of their settlement, for they may have a settlement distinct from that of their father; and therefore the order to remove the children to the place of the last settlement of the father is ill.

Cafe 54. The King *verf.* ———. In B. R.

A *Certiorari* lies
to remove an or-
der of justices of
the peace upon a
private act of
parliament.
1 Ld. Raym 580.
1 Salk. 146.
12 Mod. 403.

A *Certiorari* lies to remove an order made by the justices of peace concerning the repair of a bridge and wear, pursuant to a private act of parliament; and the justices ought to return the private act upon which their order is founded. And a *Certiorari* was granted accordingly by the Court.

Cafe 55. The King *verf.* Corporation of Rippon.
In B. R.

An action lies
against the mem-
bers of a corpora-
tion by their pri-
vate names for a
false return to a
Mandamus by
their corporate
name. 1 Ld.
Raym. 564. S. C.
2 Salk. 433. S. C.
Carth. 227.

B*Y the Court.* An action lies against any of the members of the corporation of *Rippon* in *Yorkshire* by their private names, for a false return to a *Mandamus* directed to the corporation by their corporate name. And so, as *Holt* C. J. said, it had been held in an action for a false return to a *Mandamus* directed to the corporation of *Canterbury*. (a)

(a) T. Jones, 116. 2 Lev. 236. S. C. 3 Keb. 859. S. C.

Pett *vers.* Pett. In B. R.

Case 56.

A *Mandamus* to the spiritual court was moved for, to make distribution according to the statute 22 & 23 Car. 2. c. 10. and the case appeared to be this: a libel was exhibited against the administrator, setting forth, that the intestate had two brothers, who had issue and died; the issue of one of the brothers had issue a son and a daughter, and then the intestate dies; and his grand nephew and grand niece, the son and daughter of the issue of one of the brothers, wanted to have distribution with his niece, the issue of the other brother: but the Spiritual Court had denied it; for that there is a proviso in the act of parliament, that there shall be no representatives admitted after brothers and sisters children; which occasioned the motion for a *Mandamus*. But it was denied for the reasons given in the last case of *Raymond's Reports*. (a)

There shall be no representation after brothers and sisters children.
 1 Ld. Raym. 571. S. C.
 Holt 259. S. C.
 1 Salk. 250. S. C.
 3 Salk. 138. S. C.
 2 Eq. Abr. 435. pl. 16. S. C.
 12 Mod. 409. S. C.
 1 P. Wms. 25. S. C. 594.
 Gibb. Cod. 487.
 4 Burn's Eccle. Law, 370.
 2 Vern. 233.
 Prec. Cha. 28.
 1 Show. 286.
 Lovelash, 77.
 (a) Raym. 496.

Rock *vers.* Layton. In B. R.

Case 57.

THIS was an action against the sheriff for a false return, and the declaration set forth, that an action was brought against the plaintiff as administratrix, and judgment by default. The defendant [*scil.* in that cause] *pendente lite* confessed a judgment to another creditor, and satisfied that debt; yet the sheriff, upon a *fieri facias* issuing upon the second judgment, returned, that he had assets to the value of the money paid upon the judgment confessed *pendente lite*; and for this return the present action against the sheriff was brought, supposing that this return was false, for the plaintiff had not assets sufficient in his hands; for that it was lawful for him to satisfy the first judgment; but here the sheriff took upon himself to adjudge a *devastavit*, by which practice the *scire fieri* inquiry will be taken away. But by the Court the action lieth not, for the sheriff has done his duty; for when a judgment is given against an executor or administrator, it is given of all assets which he had at the time of the commencement of the action; and if an executor or administrator hath paid off a judgment *pendente*

judgment against an administrator by confession or default *pendente lite*, is an admission of assets, and he is estopped to say the contrary on a *devastavit* returned.
 1 Ld. Raym. 589. S. C.
 Salk. 310. S. C.
 5 Com. Dig. 203, 204.
 Bull. Ni. Pri. edit. 1790. p. 142.
 3 T. Rep. 689.
 Vin. Abr. Tit. Executors
 (Z. s. 16.) pl. 2.

lite,

ROCK v.
LAYTON.

(a) Str. 732.
Doug. 452.

(b) 1 Sid. 54.
2 Sid. 12.
2 Str. 732.
Hob. 2^o 3.
1 Ld. Raym.
590.

lite, it cannot be given in evidence upon *plene administravit* pleaded, for it ought to be pleaded specially; and if a judgment is ill pleaded, the executor subjects himself to the value of it; (a) so if an executor hath assets to the value of 100*l.* and two actions are brought against him for 100*l.* a-piece, and judgment in both, he shall be charged to each judgment with assets of 100*l.* and shall be compelled to the payment of 200*l.* without possibility of avoiding it; so here the plaintiff had time to plead the satisfaction of the first judgment; (1) and as she did not plead it, she is liable to answer for all the assets she had in her hands at the time when the action commenced; and the sheriff hath made a right return. And Holt C. J. cited a case between (b) *Gilbert and Clerk*, which is imperfectly reported in *Siderfin*, which was a judgment against the tenant in tail in debt, and a *scire facias* issued against the heir and the tertenants; and the issue was returned as tertenant, and a *scire feci* against him; upon which there was a judgment and an *elegit*; upon that a moiety of the estate-tail was extended, and the issue brought an ejectment: and it was resolved that he had no remedy, for he could not give the estate-tail in evidence, because he had had his time upon the *scire facias*; otherwise if the *scire facias* against the issue had been returned *Nihil*. (2)

(1) It is the common case, that where a man has matter of bar to plead, and he slips his opportunity of pleading it, he loses the benefit of it for ever. 1 Ld. Raym. 590. 2 Str. 1043. Cowp. 727.

(2) Gould Justice laid it down in this case as reported by Ld. Raym.

591, that every thing might be produced in evidence upon *non devastavit* upon the *scire fieri* inquiry, which might have been given upon a *plene administravit*. Vin. Abr. Tit. Evidence, (P. b. 7.) pl. 4.

Fisher *vers.* Wigg. In B. R. (1)

Case 58.

THIS was an action of ejectment; and upon a special verdict the case appeared to be as follows: A man seised of copyhold lands to himself and his heirs, according to the custom of the manor, having issue two sons and three daughters, surrenders it to the use of *Grace* his wife for life, remainder to his five younger children to be equally divided, to them and their respective heirs; and whether they were tenants in common or jointenants was the question. Mr. *Williams* argued, that they are tenants in common; for so they would be in the case of a conveyance of a freehold; and *a fortiori* in case of a copyhold; and the Judges ought always to make such construction as will best support the intent of the parties; and here the intent of the party is manifest that they should be tenants in common; for the words "to be equally divided," divides the estate of the grantor, and the words, "and their respective heirs," shew the intent to be, that the inheritance should also be divided; no particular form of words is necessary to make a tenancy in common; if the intent appears to be, that the grantees should take in common, it is sufficient. The diversity between the words "into three parts divided," and the words "into three parts to be divided," is exploded; for when a gift is made to any persons "equally to be divided," those words make them tenants in common; the subsequent words explain the first; as a bill of exchange payable to the use of *B. and C. equally to be divided*, is not joint but several. *Cro. Eliz.* 729. (a) Those words in a will shall make a tenancy in common, (b) and words in the surrender of a copyhold estate are (c) construed favourably, as well as in a will; and he cited *Stile* 434. 2 *Vent.* 365. *Broderick contra*; the words of the surrender are to five children, which gives them a joint estate,

A copyhold estate surrendered to several, equally to be divided, and to their respective heirs, is not a joint estate, but an estate in common.

1 Raym. 622. S. C.
1 P. Wms. 14. S. C.
12 Mod. 296. S. C.
Holt 369. S. C.
1 Salk. 391. S. C.
3 Salk. 206. S. C.
Lill. Ent. 205. Say. 68.
1 Willf. 341.

No precise words are requisite to make a tenancy in common.
12 Mod. 299.

[*89]

(a) Yelv. 23. S. C.
1 Brownl. 82. S. C.
Moore 667. S. C.
Owen 127. S. C.
(b) 1 Vern. 65.
2 Roll. Abr. 8.,
Comp. 658. Say. 68.

1 Atk. 493, 494. 2 Atk. 122. 3 Atk. 525. 1 Vef. 165. Prec. Ch. 491. Cowp. 658. 2ay. 68.
2 Bl. Com. 193. (c) 1 Vef. 253. Carth. 343. 12 Mod. 299.

(1) This case is much more fully and satisfactorily reported in the books quoted in the margin.

and

FINNER v.
WIGG.

(a) 2 And. 202.
S. C.

and the subsequent words "equally to be divided" do not make it several, until a division be made; and the construction of surrenders ought to be according to the construction of other conveyances, and not according to the construction of wills. And he cited *Stile* 211. *Poph.* 52. (a) See more *infra* p. 92.

Case 59.

Harman *vers.* Ouden. In B. R.

Assumpsit to deliver oatmeal on board a vessel (to be brought by the plaintiff) on or before the 18th of *January*, breach, that he did not deliver upon the 18th is good after verdict.

1 Ld. Raym.
620. S. C.
12 Med. 421.
S. C.
Holt 127. S. C.
2 Salk. 140. S. C.
5 Com. Dig. 41,
42.
Bull. Ni. Pri.
edit. 1790.
p. 162.
Co. Litt. 211. a.
Cro. Jac. 9.
a Lev. 293.
a Vent. 221.
S. C.

[*90]

(a) *Vide infra*
p. 117. 174.
5 Com. Dig. 432.
(b) *Moore* 122.
q. 666. S. C.

THIS was an action upon the case upon an *assumpsit*, in which the plaintiff declared, that in consideration of 70*l.* paid by him to the defendant, the defendant assumed to deliver so many quarters of oatmeal at *Newhaven* aboard a vessel, to be there prepared by the plaintiff, on or before the 18th day of *January* next following; and it was assigned for breach, that the defendant did not deliver the quarters of oatmeal upon the said 18th day of *January*, at *Newhaven*, to his damage, &c. After a verdict for the plaintiff in the county of *Suffex*, it was moved in arrest of judgment, that here the breach was *not well assigned; for the plaintiff laid in his declaration the promise to be, to deliver the oatmeal on or before the 18th day of *January*, so that the defendant had liberty to tender or deliver it before that day, as well as at that day; the breach is, that the defendant did not deliver it at the day, but it is not said, that he did not deliver it before. But *Holt* C. J. gave the opinion of the Court, that the declaration was sufficient, for the 18th day of *January* was the proper day for the delivery; for if the defendant had tendered the quarters of oatmeal at any time before that day, and the plaintiff had not been there to accept of the tender, the tender had not been good; (a) and in an action brought by the plaintiff, the defendant cannot avoid the payment by such a tender; and this appears by the case *Cro. Eliz.* 14. (b) A man was bound by an obligation to pay money on the 29th of *September* or before, and he tendered the money at the place on the 28th of *September*, the obligee not being there to receive it; and it was held by the Court, that the tender was not good; for it ought to have been made on the last day, viz. on the 29th of *September*.

ber. Here in the principal case the 18th day of *January* was the last day for the delivery, and the defendant could not make delivery or tender before that time to the plaintiff, if he were not present to accept; but if the plaintiff had been present at a day before, and had received the oatmeal, yet the declaration is good after a verdict; for the defendant might give such acceptance in evidence, and then the issue would be for the defendant; but when the issue is found for the plaintiff, the verdict aids the declaration, and shews that there was no delivery at or before the 18th day of *January*; and for that purpose he cited the case 2 *Saund. (a) Peters and Opie.*

HARMAN v.
OUDEN.

(a) 2 *Saund.* 350.
1 *Vent.* 177.

214. 2 *Lev.* 23. 2 *Keb.* 811. 837. 3 *Keb.* 45.

Hilliard *vers.* Jennings. In B. R.

Case 60.

THIS was an action upon the case, upon a feigned issue directed by the Court of Chancery, to try whether a devise of lands in the county of *Somerset* was good. And upon a special verdict the case appeared to be this: *Thomas Jennings*, husband of the defendant, being seised in fee, by his will *dated the 27th of *December* 1679, devises in these words: *I give to my son Thomas Jennings my lands in Somersetshire, and to his heirs, and if my said son Thomas die without issue of his body, or before his age of twenty-one years, I give the same lands to my two daughters, equally to be divided, &c.* Afterwards the testator dies, leaving issue *Thomas* his son and two daughters; the son attained the age of twenty-one years, and then made his will in writing, which was executed in the presence of *A. and B.* and *William Hilliard* the plaintiff, and thereby devises the same lands to *William Hilliard* the plaintiff, and afterwards dies without issue. And it was argued by *Cartbew* for the plaintiff; and he insisted, first, that *Thomas* the son had an estate in fee, which he might devise.

2 *Eq. Abr.* 308.
P. 9.
1 *Freem.* 509.
S. C.
Cartb. 514. S. C.
(1)
12 *Mod.* 276.
S. C.
1 *Ld. Raym.*
505. S. C.

[*91]

A devise is not a sufficient witness to a will, within the statute of frauds.

1 *Bl. Rep.* 11.
101.
1 *P. Wms.* 557.
2 *Str.* 1253.
1 *Burr.* 414.
4 *Burn's Ec.* Law. 82. 86. (2)

(1) *Cartbew's* Report of this case is said, by *Blackstone*, Justice, to be the best, because he was counsel in the cause. 1 *Bl. Rep.* 101.

(2) Dr. Burn, in the 4th vol. of his
VOL. I.

H

Eccl. Law, from p. 75, has stated very fully the opinion of the judges and counsel respecting the credibility of attesting witnesses.

Secondly,

HILLIARD v.
JENNINGS.

Secondly, that the will was well executed, although the plaintiff who claimed by the will was one of the witnesses to it.

Hardr. 148.

And as to the first point he insisted, that the devise to *Thomas* the son (by the father's will) and if he died without issue, or before his age of twenty-one years, was an estate in fee, and not in tail; for the word (or) ought to be taken conjunctively as (and); and the words are tantamount, as if he had said, "If my son *Thomas* die without issue before his age of twenty-one years;" and it was resolved in the case of *Saule* and *Gerrard*, Mo. 422. Cro. Eliz. (a) that if a man devise to his son and his heirs, and if he dies before the age of twenty-one, or without issue, to *B*; the word (or) shall be taken (and); and so in the present case.

a Raym. 1209.

(a) Cro. Eliz.
525.
Noy 64.

(b) 29 Car. 2.
c. 3. l. 5.
Vide 25 Geo. 2.
a. 6.
Bull. Ni. Pri.
edit. 1790.
p. 265.

As to the second point he insisted, that here are three credible witnesses according to the words of the statute; (b) for although the plaintiff cannot be examined as a witness in his own cause, yet the will being proved by other witnesses, he is a credible witness to the will, although not in this cause, and there is a diversity between a person who is infamous and incapable to be a witness at all, and such a one who may be a witness, but in a particular case is not allowed to be examined in respect of his interest; and he insisted that the statute, which was made for the preventing of frauds and perjuries, ought to be expounded favourably, as in *Sir George Sheer's* (c) case, where the witnesses [to a will] had subscribed their names in another room, and because the testator, if he had been raised in his bed, might have seen them through a glass door, it was held an attesting in his presence. *Vide infra* p. 94.

[92]

(c) Carth. 21.
2 Salk. 688.
1 Eq. Abr. 403.
pl. 8.
Bull. Ni. Pri.
edit. 1790. p. 265.
1 P. Wms. 740.
Doug. 241.

Case 61.

Fisher *vers.* Wigg. In B. R.

The surrender
of a copyhold is
to have the same
favourable con-
struction as a
will.
Vide supra p. 88.

IT came afterwards for the opinion of the Court. And by *Turton* and *Gould* Justices, they are tenants in common as well as if the estate had been given by will, for a surrender is made to a Use, which hath as favourable a construction as a will, and the intent here seems to be, that the issue should take

take the estate in common, the profits to be equally divided; and there are not any prescript forms of words for making a joint-estate or an estate in common; but where the intent of the party appears to be for the one or for the other, such the estate shall be accordingly; and therefore if a man gives an estate to two, *habend* one moiety to the one, and the other moiety to the other, this makes an estate in common. *Co. Lit.* (a) And *Gould* cited a case *P. 32 Car. 2.* between *Smith* and *Johnson*, where a man made a feoffment to two, equally to be divided, and to their heirs (which is the same case with that before us). And *Scroggs* C. J. and *Dolben* inclined to the opinion, that those words made an estate in common (and not a joint-estate) as well in a deed as in a will. But *Jones* J. was of a contrary opinion, that it was a joint-estate, and upon searching the roll it appears that no judgment was entered. (1) *Holt* C. J. *contra fortiter*, That they are joint-tenants, for the essential difference between joint-tenants and tenants in common is, that joint-tenants claim by one and the same title, and tenants in common by several titles; and here all the issues claim under the same surrender. True it is, that if a feoffment be made to two, *habendum* the one moiety to the one, and the other moiety to the other, the feoffees are tenants in common, for although they claim by one deed, yet they are in by several titles, for the livery must be several, and if livery were made to one *secundum formam & effectum chartæ*, the other would take nothing. Secondly, the words *equally to be divided* make nothing more than what was expressed before, for between joint-tenants the profits ought to be equally divided.

Fisher v. Wigg.

(a) *Co. Litt.* 190. b.

Joint tenants claim by one title and tenants in common by several titles. *Co. Litt.* 188. b.

[98]

But judgment was given according to the opinion of the other two judges. 1 *Salk.* 392. (2)

(1) Lord Hardwicke in the case of *Rigden v. Kallier* reported in 3 *Atkyns* declares "that no person has more reverence for the arguments of Lord Chief Justice Holt than he has; but in *Fisher* and *Wigg*, the arguments of the other two judges are more agreeable to the reason of the thing, and his more subtle and finely spun." p. 734.

(2) This case is determined upon

the principle that a surrender of a copyhold is to have the same favourable construction as a will. Though this principle is opposed in the case of *Idle v. Cook* 1 P. Wms. 70. it is acknowledged and the present case is considered as law in the case of *Gaffin v. Gaffin*. Cowp. 660, 1. Will. 341. 2 Ves. 257. Say. 67.

Case 62.

Hunt *vers.* Bourne. In B. R.

Tenant in tail or lands in ancient demesne levies a fine in the court of Antient Demesne for three lives with warranty, levies a second fine with warranty to the use of his self and his heirs and then bargains and sells to one and his heirs. The following points were determined. 1st. That fines may be levied in courts of ancient demesne. 2dly. That such fines are no bar to the issue

in tail, but that they work a discontinuance. 3dly. That the discontinuance determined with the three lives, and that the second fine made no discontinuance. And lastly, That the issue in tail have twenty years to make their entry, after the expiration of the lease for lives. 1 Salk. 57. 244. 339. 2 Salk. 22. 3 Salk. 34. S. C. Holt 60. 255. 5. C. 1 Lutw. 770. S. C. 1 Bro. P. C. 48. S. C.

ERROR of a judgment in *C. B.* The case was this: a man seised of an estate-tail with remainder over of land in ancient demesne, (1) levies a fine in the court of Antient Demesne for three lives on the 25th of May 22 Car. 1. according to the custom of the said manor, before *A.* the deputy of *Walter Earle*, steward, and *R.* attorney, and *B.* and *S.* attornies of *C.* a suitor in the same court, in a plea of covenant *come ceo, &c.* to *Nurse* for life, rendering rent with warranty; and the jury found that this land had not been usually demised, and that the rent was not the customary rent; and afterwards the same tenant in tail levied a fine with warranty 24 Car. 1. to the use of himself and his heirs, and afterwards bargained and sold the same land to *Pain* and his heirs, under whom the defendant claimed. The tenant in tail dies in 1663. *Nurse*

(1) "Antient Demesne, *antiquum dominicum Regis*, consists of those manors, which (though now perhaps granted out to private subjects) were actually in the hands of the crown in the reign of Edward the Confessor, and at the accession of William the Conqueror; and so appear to have been by the great survey in the Exchequer called Domesday Book." Blackst. L. Tracts. 3d. ed. p. 217. F. N. B. 31. 35. Tenants of lands of this description cannot sue or be sued for their lands by the usual real actions of assize, writ of entry, &c. in the King's courts of common law. But the only method of recovering these tenements is by a peculiar mode of process, called a writ of Right Close. "Unicum habent beneficium recuperationis per quoddam breve de recto clausum," says the writer of Fleta, lib. 1. c. 8. An account of this writ is to be found in Fitzherbert's Na-

tura Brevium 8th edit. p. 23. The author of Fleta describes these tenants in the following manner. "Hinc est quod sokmanni hodie dicuntur esse, a focco etiam derivantur, quorum tenementa sunt villenagium domini privilegiatum, et ideo dicuntur glebæ ascriptitii, eo quod ab hujusmodi glebis amoveri non debent quamdiu solverint debitas pensiones, nec compelli poterunt ad hujusmodi tenementa tenenda contra suas voluntates, eo quod corpora sua sunt libera" Fleta lib. 1. c. 8. This passage explains the observation of Lord Holt "that tenants in ancient demesne are free as to their *persons*, not as to their *estates*;" 1 Salk. 57. Holt 60. For farther information upon this subject application may be made to the 4th. Institute p. 269. and to Sir W. Blackstone's Law Tracts 3d edit. p. 213. 237.

dies in 1693; and *Richard Guillam*, the heir in tail of *Thomas Guillam* his grandfather who levied both the fines, enters; and whether his entry was lawful, or not, was the question.

HUNT v.
BOURNE.

And it was argued by *Eyre*, that the fine in antient demefne made a discontinuance of the estate tail, of which the conusor of the fine was seised. By the common law a fine might be levied of land in antient demefne in the court of Antient Demefne, as well as a fine in *C. B.* might be levied of freehold land; and the statute 18 Ed. 1. *de modo levandi fines* does not alter the case, for that statute was only declarative of the common law; but by the statute (a) *de donis conditionalibus* a fine of an estate-tail was declared null; after which a fine as well in antient demefne as in *C. B.* was not a bar but only a discontinuance until the (b) 4th of *H. 7.* when a fine with proclamations was made a bar; but this statute of the 4th of *H. 7.* does not extend to fines in ancient demefne; and therefore fines there as they do not make any bar, yet they make a discontinuance to the issue in tail; and so it was held (c) 1 *And.* and it is not any objection that the court of Antient Demefne is not a court of record; as to the objection, that here if there be a discontinuance, it discontinues the fee, because a fine *sur consueance comece*, &c. conveys the fee without the word *heirs*, and I grant that the old books say so, but this is doubtful since the statute 18 Edw. 1. *de modo levandi fines*, since which statute there ought to be an *habendum* of the estate to the heirs in fines as well as in other feoffments and grants, &c. *Vide infra* p. 124.

[94]

(a) St. Westm.
2. 13 Edw.
1. c. 1.

(b) St. 7 Hen. 4.
c. 24.

(c) 1 And. 71.
infra p. 124.

Almanzor *vers.* Davilack. In B. R.

Case 63.

THE plaintiff was nonsuited for a fault in the declaration, (1) and afterwards commenced a new action. And *Holt C. J.* said, that it had been ruled that the defendant in such case should be admitted to common bail. (2)

Where the plaintiff hath been nonsuited for a defect in the declaration, the defendant shall be admitted

to common bail in a new action brought. 1 *Ld. Raym.* 679. *S. C.* 1 *Com. Dig.* 482. 1 *Rich. Pr.* K. B. 123. *Str.* 439. 2 *Will.* 381. 1 *Crompt. Pr.* 29. *Tidd's P.* 36.

(1) According to the report in Lord Raymond 679. there was a nonsuit in this case for want of a declaration.

(2) The authorities upon this point are contradictory, for in *Strange* 439. it is laid down that the defendants after a

Case 64.

Hilliard *versus* Jennings. In B. R.

Vide *supra*,
p. 90.

[95]

THE case above having been argued by *Cartbew* for the plaintiff, was now argued by *Pratt* Serj. on the other side; and he insisted, that *Thomas* the son took no more than an estate-tail by the will of his father; for the words "if my son die without issue of his body" make an estate-tail, and then the words "or under the age of twenty-one years" are restrictive, and make the estate-tail determinable on his death under that age; so that in either case the daughters ought to take; the word *or* is disjunctive in its proper signification, and ought not to be taken otherwise, where it is not necessary; and the case of *Sowle* and *Gerrard* allows that the son had an estate-tail: but to this point no opinion was given by the Court. And *Holt* C. J. was not for allowing the case of *Sowle* and *Gerrard*; as to the other point he agreed, and it was held by the Court, that the will was not well executed, for the plaintiff was not a credible witness, as he himself was to take by the will; for the intent of the statute was to prevent any practice by persons interested in the obtaining of a will; and if he who is to take by a will may be a good witness, it will be an encouragement to such practice. But by the importunity of counsel it was adjourned. (1)

3 P. Wms. 557.

non-suit suffered by the plaintiff shall find special bail in the second action. And the reason given is that the plaintiff

suffers enough by paying costs in the first action, and therefore ought not to be in a worse condition than before.

(1) It is said in 1 Freem. 510. "That the Court in both points inclined against the plaintiff; viz. That the son had but an estate tail, and so the devise to the daughters took effect, the son being dead without issue; for though it is devised to him and his

heirs, yet the latter words *if he die without issue* make it an estate tail; (2) for his meaning seems to be plain, that if the son had issue, that issue should have it; if not, it should go to the daughters.

(2) Vide *supra* the case of *Nottingham versus Jennings*, p. 82. and the authorities there cited.

D E

Termino Pasch.

13 Will. III. In B. R.

Blackborough *vers.* Davis.

Case 65.

A Motion was made for a *Mandamus* to the spiritual court, after an administration granted to the grandmother, that another administration should be granted to the aunt, for by the statute of 21 H. 8. c. 5. f. 3. the spiritual court ought to grant it to the next of kin; and if it is granted to another, the grant is void, and this Court hath power to direct and command it to be granted to the person who by our law is next of kin, and she is the aunt and not the grandmother; as to the objection, that there may be an appeal, that is no cause why a *Mandamus* shall not go to the spiritual court; for if the temporal court will not grant one, after an administration is granted there, the statute will be eluded, for an administration will be granted [on an appeal] before a motion can be made for a *Mandamus*. But the Court was of a contrary opinion, for by the statute of 31 Edw. 3. c. 11. administration shall be granted to such person as the ordinary pleases; then the statute of 21 H. 8. c. 5. requires to make grant of the administration to the wife or to the next of kin who requires it; but if the ordinary does not grant it to the next of kin, but to a mere stranger, yet the administration is not void, but was good upon the statute of 31 Edw. 3. and therefore if an administration be repealed upon a citation, (a) the acts by the first administration are good. 6 Co. 18. b. *Packman's* case. But those acts could not be good, if the grant to a man not of the next of kin was absolutely void, and therefore the remedy for the plaintiff is by appeal; and if fourteen days elapse by citation

A *Mandamus* does not lie to the spiritual court after administration granted. 1 Salk. 38. 251. S. C. 72 Mod. 615. S. C. Holt 43. S. C. 1 Ld. Raym. 674. S. C. 1 P. Wms. 41. S. C. 2 Bac. Abr. 381. Gibb. Cod. 479. 482. 4 Burn's E. L. 357. 361. *Infra* p. 108.

Administration granted to an improper person not void but voidable. (a) 3 Term Rep. 128.

BLACKB-
ROUGH v.
DAVIS.

(a) 3 Salk. 22.
Raym. 93.
1 Keb. 667,
683. 1 Sid.
279

or before administration, if the ordinary proceeds to grant it to an improper person, a prohibition shall be granted. And *Holt C. J.* cited a case of *Sir George Sands*, (a) if administration be granted to the next of kin of the husband, the wife cannot repeal it, but if it is granted to the next of kin to the wife, the husband may repeal it. *Vide infra p. 108.*

Case 66.

The King *vers.* The Inhabitants of Gravesend. In B. R.

Order of removal ill, because the pauper was thereby sent to the master, and not to the parish where settled.
3 Burn's Just.
477.

A Motion was made to quash an order of sessions. First, Because an order was made by two justices to send *J. Goodberry* from *Gravesend* to *Lawton* her master in *Chadwell* (with whom she was hired as a servant for a year) until she should be discharged; and afterwards on the 21st of *November*, (the first order having been made on the 6th of *November* by the justices of *Gravesend*), another order was made by two justices of the county of *Essex*, to send the same person from the parish of *Chadwell* to the parish of *Gravesend*; and it was insisted that the second order was ill, being made before any appeal from the first order, or Discharge from the service. *Sed non allocatur*; for the first order was to send the person to her master, from which order no appeal lies, and not to send her to the parish of *Chadwell* as the place of her settlement. Secondly, It was objected that the second order was ill, for that the words are, *These are to order you to remove J. Goodberry to the parish of Gravesend, and to deliver her, &c. there to be provided for according to law, unless she be able to provide for herself*, and these last words refer to all the ordering part, and make the order conditional; and so if she was not able to provide for herself she ought to be removed, and if she was, she ought not to be removed. *Sed non allocatur*; for those words are only explanatory of the former words, when she ought to be provided for.

Thorpe *vers.* Thorpe. In. B R.

Case 67.

ERROR of a judgment in the Common Pleas in *Affumpfit*, in which the plaintiff declared, and set forth an agreement that he was to release the equity of redemption to a certain copyhold estate, upon which the defendant agreed to the payment of seven pounds; and although the plaintiff had performed his part of the agreement, yet the defendant had not paid, &c. The defendant pleaded the release of the equity [in which were general words of release of *all demands*] in bar; and the errors assigned were, first, an equity of redemption is not valuable, being a thing that is only in Chancery, and of which the common law takes no notice. Secondly, That the plaintiff ought to shew how he was intitled to the equity of redemption, for it may be that he hath an equity, and yet the release of it be of no value, although it were true that generally an equity is valuable; and this case is like the case of *Barber and Fox, (a)* 2 *Saund.* 134, 136. *Affumpfit* against an heir upon a promise to pay a debt due by bond from his father, held ill, because it was not shewn that the heir was bound by the obligation, which shall not be intended so. *Stile* 245. Thirdly, that this release of the equity of redemption, having words in it sufficient to discharge the promise, may be pleaded in bar to an *Affumpfit* founded upon the promise, because this action is not founded upon the making of the release, but upon a promise to do another thing; and so it appears *Mar.* 75. (b) *Cro. Eliz.* 303, 703 (c) 889. And if the action is not founded upon the mutual promise, but upon the making of the release, then it ought to be averred that the plaintiff had made a release; and it is not sufficient to say that he had performed all on his part, as appears by the reason of the case in *Cro. Car.* 19.

It is sufficient to maintain an *Affumpfit*, if the consideration was a benefit to the defendant, or a prejudice to the plaintiff.
1 *Lutw.* 245.
S. C. 1 *Ld.*
Raym. 235.
662. S. C.
Holt 28. 96.
S. C. 12 *Mod.*
455. S. C.
1 *Salk.* 171.
S. C. 1 *Mod.*
Ent. 111.
Raym. Ent.
341. 1 *Pow.*
on *Cont.* 357.
Comp. 294.
1 *Com. Dig.*
138. *Hob.* 216.

(a) 1 *Vent.*
159. S. C.
2 *Keb.* 811.
836. S. C.

(b) *Poph.* 30.
S. C.
(c) *Moore* 574.
pl. 797. S. C.
1 *Term. Rep.*
443.

But it was objected, that the general words of the release, which was intended for a particular purpose, *viz.* to release the equity of redemption, shall be restrained to the subject

THORPE v.
THORPE.

matter. To which Mr. *Cooper* answered, that it is true where the words are all in one sentence, as in the cases cited, it shall be so. But here are different clauses, for first he releases his equity; and then begins another sentence, "I do also release" "all other actions, demands, &c."

To the first error assigned it was answered, that an equity of redemption is within the notice of the Court, which takes consufance of trusts and other acts.

To the second error, that if it do not appear that it [the equity of redemption] is not valuable, it shall not be intended; the cases of a surrender of a lease at will, &c. are of things apparently of no value, and therefore they make no consideration; but it is sufficient to maintain an *Assumpsit* if the consideration was a benefit to him who was the defendant, or be of any trouble or prejudice to the plaintiff. And by *Holt* C. J. the release of an equity of redemption is a valuable and a good consideration for an *Assumpsit*; then if the thing done is good, considerable and valuable, the promise to do it is a sufficient consideration; for although this action is founded upon the promise, yet an act to be done pursuant to such promise is the ground of the assumption; as where a man promises to deliver a horse, and another promises 20*l.* the 20*l.* is to be paid for the horse, and the delivery of the horse is to be presumed pursuant to the promise.

The release of an equity of redemption is a good consideration for an *assumpsit*.

Where the doing of a thing will be a good consideration, the promise to do it is also good.

If a man covenants to do several things, and his declaration contains a general averment of performance, this is aided by the appearance and plea of the defendant.

And as to the declaration, if a man covenants to do several things, and alledges performance generally on his part, though he ought to have alledged the performance of several things, yet this is aided by the appearance and plea of the defendant. *Sed adjournatur*. Afterwards the judgment was affirmed. 1 *Salk.* 172.

Lane *vers.* Cotton and Sir Thomas Franklin. Case 68.
In B. R. (1)

THIS was an action upon the case. The plaintiff declares upon the statute of 12 Car. 2. c. 35. by which the post-office is erected, and "one master appointed by the king under his letters patent, called the post-master general, who and his deputy shall appoint posts for all letters;" that on the 26th of May, 12 Car. 2. by letters patent the post-office was erected; that by patent bearing date the first year of *W. & M.* the office of post-master general was granted to the defendants, with all profits, &c. with a fee of 1500 *l.* per ann. to be paid by the king; that the plaintiff inclosed exchequer-bills in a letter directed to *J. Jones*, at *Worcester*, and delivered the letter to the defendants in the office, &c. Upon not guilty pleaded, a special verdict was found to this effect: that there was such an act of 12 Car. 2. as was set forth in the declaration; that a post-office was erected between *London* and *Worcester*; that a grant of the office of post-master general was made to the defendants, as was set forth in the declaration, with a clause that they should not be charged for the default of a deputy or other person, but only for their own default; that such letter, as was set forth, with exchequer-bills inclosed, was delivered to ———, an under-agent at the post-office, and was there opened, and the bills taken out; and if, &c. for the plaintiff, &c.

The post-master general is not liable for exchequer bills lost by the negligence of the receiver out of a letter delivered at the post office.
1 Raym. 646.
1 Salk. 17. 143.
S. C.
5 Mod. 455.
S. C.
12 Mod. 471.
S. C.
Holt 582. S. C.
Carth. 487. S. C.
11 Mod. 12.
S. C.
1 Mod. Ent. 418.
1 Com. Dig. 206.
1 Bac. Abr. 47.
3 Bac. Abr. 561.
Harg. Co. Litt. 89. b. n. 3.

Gould J. was of opinion, that judgment ought to go for the defendants. First, from the nature of the office, which was for the carrying of letters; and then, if the case is considered in parts, I hold, that for the miscarriage of a letter only an action will not lie, for the damage is not of any value; but if there should be any special damage by the miscarriage of a letter, I determine nothing.

(1) This case was recognized, and the opinion of the three judges was confirmed in a late case, *Whitfield vers. Ld. Despencer & al.* Cowp. 754, in which

case it was decided that the post-master was liable for no default but his own. p. 765.

LANE v.
COTTON.

Comp. 765.

[101]

Secondly, if an action will lie, it must be in consideration of a contract, express or implied; no express contract is alleged; and no contract can be implied; for the office was erected by act of parliament, and by the words of the act a trust is reposed in the deputies, &c. by which it appears, that the intent of the act was not to make the post-master general chargeable; and therefore if the post-master dies the office continues, which shews that the office does not depend upon the post-master; and who shall be charged if such an accident happens in the time of a vacancy?

Thirdly, here the king is the head and principal of the office; all the ministerial part is intrusted with the post-master, his deputies and agents, but all the profits and revenue appertains to the king; by the paragraph of this act the penalty upon carriers, &c. who carry the letters is to be divided between the king and the informer. So in paragraph 6.

Fourthly, in this case it is impracticable to take care of all the agents, and impossible to take care for the security of those agents who travel by night and by day, and out of the kingdom; and the case of *Morse* and *Slue* goes upon this reason, that the master of a ship may take security and sufficient care of all under his command: in the case of an innkeeper,

(a) 8 Co. 32 b.
Calye's case.

(a) 8 Co. — *Callis* —, the hostler is answerable when the goods are purloined within the inn, but not if they are sent abroad; as a horse to pasture, &c. for then the inn-keeper cannot secure himself. A factor is not subject to account for goods purloined. As to the case of *Morse* and *Slue*,

(b) Raym. 220.
2 Lev. 69.
1 Mod. 85.
4 Keb. 866.
3 Keb. 72. 112.
135. 8. C.

(b) 1 Vent. 190. 238. where it was resolved, that a master of a ship was liable for goods taken out of a ship in port, it was for three reasons. First, he receives part of his wages and salary by contract. Secondly, he is the person known by the law, for he may pawn the ship. Thirdly, he may make a special contract and caution for the carriage; but all these reasons fail in the present case. But if the post-master general were generally chargeable, yet he is not so in the present case; for the delivery of exchequer-bills is a matter out of his province, and the servant ought not to have received them; he was not

intrusted

Intrusted for that purpose, and by consequence the master is not liable; and it is found by the special verdict, that he was intrusted for the carriage of letters, and not for that of other things.

LANE v.
COTTON.

Powys, J. Post-Masters before the statute of 12 Car. 2. who of their own heads set up posts, were liable as common carriers, if letters which they carried miscarried; for it was a voluntary undertaking of their own, though the premium was of little value; and this is agreeable to the reason of *Southcot's case*, 4 Co. 84. a.

Post-masters before the St. 12 Car. 2. were liable for any miscarriage.
1 Ld. Raym. 649. S. C.
Cowp. 759.

But I am of opinion, that in this case the action does not lie against the defendants. I admit, that exchequer-bills are not properly treasure, nor different from other bills, but in circumstances which encourage their currency, but do not compel it; and the verdict finds only that the plaintiff was possessed of eight bills of credit: but if they were treasure I do not see any diversity; for by the statute all packets are to be carried without distinction, the words are, "every packet of letters and other things so much per ounce;" so that if a man sends gold, jewels or other treasure, I apprehend that such packet is of the same nature with a packet of letters.

Then it is to be considered, whether the defendants in this case are liable without their actual default, by the neglect of their agents, (a) (for on an actual neglect or default in the defendants themselves I hold that they are liable;) but here the verdict finds, that the bills were taken by a person unknown, and therefore I am of opinion that the defendants are not liable. The statute doth not directly charge them, and yet the rates of letters and packets are fixed, and the Post-Master cannot alter them; but before the statute he might have fixed what rates he pleased. The letters are received in the night of persons unknown, delivered out to boys, who cannot give sufficient security; they must (as it happens) be carried by the post on the *Sunday*, when the county cannot be sued if the mail be robbed; they must be carried to parts out of the realm; the statute says nothing of the value of things to be carried, it takes notice of the quantity and weight, but not of the value; which

(a) Post-master general is liable for any fault of his own. Cowp. 765.
3 Bac. Abr. 561.

LANE &
COTTON.

which shews that the Legislature did not intend that parcels of great value should be conveyed by the post; and if such an action as this were to be allowed the office would be destroyed.

Then the principal point to be considered is, whether the post-master shall be chargeable for a mismanagement in the office; and I am of opinion that he ought not; for by the letters patent by which the office is granted to the defendants it is provided, that they shall not be liable but for their own default; for they are not officers for their own benefit, but for the benefit of the king; the defendants are only allowed a salary, and are obliged to manage the office according to the instructions which they from time to time receive from the king; the security taken by them of inferior officers is taken in the name and for the use of the king; and the wages of those inferior agents are paid by the king, and limited by the Commissioners of the Treasury.

C. W. P. 763.

If it is objected, that in this case a wrong is done without a remedy; it is frequent that damage happens where a man cannot come at any remedy. The verdict says, that the damage was done by a person unknown; if the person were known, no doubt an action on the case will lie against him.

Turton J. The action lieth not against the defendants; for the post-master general is not liable for the default of his officers and under-agents; for this is not an antient office, as appears. *Latch* 81. and if it is a new office, it is not within the reason of the antient offices; and this case differs from the cases of the same nature in most of the circumstances mentioned before: and further, exchequer-bills are now made a species of the money of *England*, which was never intended to be conveyed by the post.

Jones on Bailm.
p. 109.

Holt C. J. This is the case: Sir *Robert Cotton* and Sir *Thomas Franklyn* are constituted post-masters general by letters patent of the 3d of *May* the 3d of *William and Mary*, pursuant to the statute of 12 *Car. 2.* and thereby have power to
make

make deputies, &c. but are and ought to pursue directions received, &c. and have a salary limited, &c.

LANE v.
COTTON.

Upon which case I hold that an action lieth for the plaintiff; I do not deliver any opinion, whether an action lieth when a letter is lost upon the road, for that differs much from the present case: but the reason upon which I rely in the present case is, that by the statute of 12 Car. 2. a special trust is reposed in the post-master general for the safeguard of letters; the statute extends the benefit of the subject in the safe and speedy conveyance of them.

1 Com. Dig.
206.
Cowp. 764.

Secondly, the office is erected in a certain place, viz. in London.

Thirdly, the post-master general hath the general care and government of the whole office committed to him, all others are his deputies; and this office differs nothing from the office of marshal of the King's Bench, or those of other officers. 23 H. 6. A gaoler is chargeable for an escape, although the prison be broke open by rebels, and this even in the case of prisoners for debt, in which the (a) statute gives a *capias*, and where there was no imprisonment by common law; as appears by 3 Co. 11. b. Sir W. Herbert's case.

A gaoler is chargeable for an escape where the prison is broken open by rebels.

(a) 25 Ed. 3. c. 17. No imprisonment at common law for debt.

Co. Litt. 290. b. 2 Inst. 394. 2 Roll's Rep. 296.

2 Balf. 63. 99. Cro. Jac. 450. An inn-keeper is not liable for goods left at the inn by a stranger.

(b) Cro. Jac. 330. S. C. 1 Roll's Abr. 2. S. C. 1 Term Rep. 29.

Here is a consideration, and hire paid by the subject for letters carried; and that is the foundation of the charge upon an inn-keeper. But if goods are left at the inn by a stranger [not a guest] he is not liable, for there accrues no benefit to him; but for a horse left in the livery stable he is liable; and so in the case of a hoyman. (b) Hob. 17.

I do not allow any difference between an office constituted by statute, and one at common law, for without doubt an officer shall be charged in the one case, as well as in the other; and this without contract express or implied; but it is objected, that the post-master hath not any benefit by the carriage; I answer, that the party pays a *premium*, and that is the reason why he shall have a remedy, which cannot be but by the general officer. But here the post-master general hath a benefit, for he hath a salary of 1500 l. a year, and that out of the

LANE &
COTTON.

A carrier may
refuse to receive
goods before he
is ready to set
out.
1 Ld. Raym. 652.

the profits of the office, and therefore this case is like the case of *Morse* and *Slue*, 1 Vent. of a master of a ship; and it is there said that the master of a ship may refuse to take the goods aboard till the time of the voyage; so may a common carrier until the time of his setting out; but if he takes them into the warehouse before, he shall be charged.

(1) This case is founded upon the same reason with all the other cases of the same nature, viz. of a carrier, hostler, &c. who are not charged unjustly, but with the highest equity, viz. because of the impossibility of the proof of a special damage, for a carrier may be confederate with evil persons, and the proof of such confederacy will be impossible; and therefore by the law of all nations, a man in such cases shall be charged, and whenever our law agrees with the civil law, it shall be intended to be founded on the same reason.

An action lay
against a carrier
before the statute
of Winton.
1 T. Rep. 72.
2 Will. 92.

But it is said that a carrier robbed may sue the county, but this is by the statute of *Winchester* 13 Edw. 1. and an action lay against the carrier before by the common law.

It is objected that an inn-keeper hath servants to watch in his house all night; so may the post-master general; but then it is objected, that the post-master manages his office by night, and this is used as an argument in excuse of the post-master, which is an argument for the charge upon an inn-keeper.

But although I compare this case to the case of a common carrier, yet it is not said by me, that the post-master shall be charged for miscarriage upon the road (for I give no opinion in such a case) and there is much diversity, for a carrier is bound safely to keep and safely to carry, but the post-master is bound safely to keep, not to carry but to send. So in the case of *Morse* and *Slue*, it was agreed that the master of a ship shall not be charged for a robbery on the high-sea, nor an inn-keeper for a horse sent to pasture; but if a man orders the

(1) Lord Mansfield, in the case of *Whitfield v. Ld. Le Despenser, & al* opposes this doctrine, and declares that

no resemblance exists between a post-master and a carrier. Cowp. 764.

hostler to send his horse to pasture when he is cool, and before that he is stolen, the inn-keeper shall be charged.

LANE v.
COTTON.

The post-master cannot refuse the acceptance of a thing which is proper for his carriage, but an action lieth against him for such refusal, as well as against a Smith for refusing to shoe a horse.

An action lieth
against a carrier
for refusing to
shoe a horse.
Keilw. 50. a.

Then exchequer-bills are proper to be sent by the post as well as bills of exchange, and the statute doth not restrain the post-master to the carriage of any thing in particular.

It hath been objected that exchequer-bills have been instituted since the statute of 12 Car. 2. but if they are proper to be sent by the post, though they are newly created, they are within the statute made before, as in 4 Co. 4. *b. Vernon's case*; where a devise to a wife for a jointure by force of the statute of 32 H. 8. was holden a good jointure within the statute of 23 H. 8. made before.

A late act is
within the equi-
ty of an act
made previously
Plowd. 92. 127.
2 Bownl. 115.
207.
W. Jones, 183.
2 Inst. 35. 322.
Cro. Eliz. 177.

With the same reason it may be said that trover does not lie for exchequer bills taken from the possession of one by another and converted, as that exchequer-bills are not to be carried within the statute of 12 Car. 2. Bills of exchange payable to bearer are good bills and ought to be paid, but bills payable to order are for the convenience of indorsement, for every indorser becomes liable.

It is objected that nothing is to be paid for a bill of exchange, and therefore the post-master is not liable for it; but payment is made for the letter which incloses the bill of exchange, although it is not enlarged in respect of the bill, and the letter shall be intended to be in respect of the bill; a guest pays nothing for the custody of his goods, but the inn-keeper shall be charged for them, in respect of the benefit which he hath for the diet of his guest; or if the post-master hath no benefit for bills of exchange, yet being a public officer intrusted with them, he shall be charged for the negligent custody of them; it is granted that a post-master before the statute of 12 Car. 2. was chargeable with the miscarriage of letters or goods. Then that statute does not alter the nature of

[107]

LANE v.
COTTON.

the office, but only confines the carriage of letters to certain special persons; as before the act of parliament he was liable, and now that act obliges all persons to send by the post-master, shall the subject by the same act be ousted of his remedy?

Infra p. 469.
in note.

Another objection is, that an action may be brought against the sub-agents, but for neglect the principal must answer for his inferior officers.

Hob. 13.

The post-master hath the whole management of the office; if he makes a deputy, although for life, he may turn him out. 39 H. 6. 1. He hath the sole power to make and turn out his deputies, and therefore must answer for his deputies and all his officers.

Another objection is, that they are all butfellow servants, and all receive their salaries of the King; but they are retained by the post-master and under his command, and then they are his servants; but suppose it granted that they are not the servants of the post-master; then the case will be, that the defendants who are intrusted by virtue of an act of parliament with the management of an office, employ persons in that office who are not their servants, and who imbezil goods brought thither, and then the defendants must be answerable for them.

Another objection is, that the act of parliament of 12 Car. 2. never intended that the post-master general should be answerable for the neglect of his deputies and servants; but that does not appear, and is only *gratis dictum*; and it seems to me that the act of parliament did intend it, for when an act of parliament makes a new officer, and intrusts him with the property of the subject, it is to be presumed that the act of parliament intends to make him chargeable as other officers of the same nature are; and the statute says that he is constituted for the safe dispatch of letters; and by another clause it appears that the act of parliament intended to make him answerable for his servants and deputies; for it is provided that the post-master and his substitutes shall provide post-horses,

[108]

Uc.

£c. and for default the post-master shall pay 5*l*. &c. the post-master, without mention of his deputies.

LANE v.
COTTON.

. Another objection is, that the office by this means will be destroyed; but ought we to preserve the office to the prejudice of the subject? the office will be more careful, and if it takes sufficient care it cannot be destroyed.

Another objection is, that exchequer bills may be sent by another way; but a man has a right to make his election by which way he will send them: shall an inn-keeper answer for goods stolen in his inn, when the guest might have been entertained in another inn? certainly he shall; but exchequer bills cannot be sent by any other way with so much speed.

It hath been asked by way of objection, shall the Post-master be answerable [for things of great value] when he hath so small a *premium*? certainly he shall, if he is charged by the law, and he accepts of the office upon such terms. Another objection is, that the Patent of the defendants says, that they shall not be answerable for their substitutes in any default, but only for their own proper neglect; but this clause regards only the imbezilment of the Revenue. And yet Judgment was given by the opinion of three Judges for the defendants. (1)

(1) At the end of this case reported by Ld. Raymond we find the following observation: "But however the plaintiff intending to bring a writ of error upon the said judgment, the defend-

ant seeing that, paid the money to the plaintiff as I was informed. 1 Ld. Raym. 658. Cowp. 762. 3 Pr. Wms. 374. in note.

Blackborow *vers*. Davies. In B. R.

Case 69.

IT was now urged, that the grandmother was in equal degree with the aunt; and so thought the Court; for the mother is nearer of blood than the brother, (and therefore the statute of 1 Jac. 2. c. (a) was made to give distribution to the brother with the mother) and by consequence the grandmother

Vide *supra*, p. 96.

(a) 1 Jac. 2. c. 17. s. 7.

BLACKBROW

v.
DAVIES.

is in equal degree with the aunt ; (1) the descent to an uncle is not immediate, but mediate, and the pleading of such a descent ought to shew how he is heir. And the *Mandamus* was denied by the whole court.

(1) There is much obscurity here ; and I apprehend from the other reports of the same case, we should read *and by consequence the grandmother is nearer in degree than the aunt*, for if she was only equal in degree, the aunt would have

been entitled to her distributive share, which was denied upon the ground of her being more remote. 1 Salk. 38. 251. 12 Mod. 622. Prec. Ch. 527. 2 Vez. 215.

Case 70.

The King *vers.* Eller. In B. R.

When the court will not hear any argument about the plea on a demurrer before the trial of the issue. 12 Mod. 494. S. C. but not S. P. 5 Com. Dig. 148.

THIS was an information against the defendant for counterfeiting several receipts of several persons, to whom sums of money were due out of the exchequer, by means of which receipts he, without the privity of the persons to whom the money was due, did receive the sums aforesaid. The defendant, as to the counterfeiting of the receipts or knowing them to be counterfeited, pleaded not guilty; and as to the residue of the information he pleaded, that he received the said receipts of one *Smith*, a solicitor, and received the money; and after a discovery of the fraud in *Smith* he gave notice to the persons, and paid the money to them without prejudice to the Exchequer. To which it was demurred, for that this plea amounts to the general issue. But the court would not hear any argument concerning the plea before trial of the issue.

Case 71.

The King *vers.* Tyler. In B. R.

A defect in a writ is aided by the voluntary appearance of the defendant, but not when his appearance is by coercion. 1 Ld. Raym. 671. S. C. 1 Salk. 63. S. C. 12 Mod. 416. 448. S. C.

THIS was an appeal for murder. The defendant (*Protestando*, that the writ is not sufficient, for that there are not fifteen days between the *Teste* and the return of it) pleads that he was formerly indicted for the murder, and found guilty only of manslaughter; whereupon he prayed the benefit of the clergy, and had it. To which there was a demurrer. And as to the writ, it was said by the counsel for the plaintiff, that

that this matter [of the *Protestando*] was pleadable in abatement; but as the defendant hath not pleaded it, but only taken hold of it by *Protestando*, the appearance aids the writ.

The KING v.
TYLER.

Holt C. J. said that it appears upon the record; and altho' a voluntary appearance aids the defect of form in the writ, yet an appearance by coercion does not aid it; and by the law there ought to be fifteen days between the *Teste* of the writ and the effoin-day; but here the appeal was tested on the 9th day of *October*, returnable *quinden' Mich.* and the day of effoin happened on the 20th of *October*. *Sed adjournatur.* (1)

[110]

(1) Judgment was given in this case for the defendant. 1 Ld. Raym. 672.

Freke *vers.* Thomas. In B. R.

Case 72.

THIS was an action of debt by the plaintiff as administrator *durante minore etate* of *Dutton Stede*, upon a bond for 40*l.* made to Sir *Edwin Stede* on the 1st of *March* 1693. which was not paid to Sir *Edwin* in his life time, nor to the plaintiff afterwards, to whom administration of all and singular the goods and chattels of the said Sir *Edwin*, to the use and benefit, and during the minority of the said *Dutton Stede* a minor, which said *Dutton Stede* is now under the age of 21 years, to wit, of the age of 18 years, and no more, was committed, by *Thomas* by divine providence Archbishop of *Canterbury*, &c. after the renunciation of all the executors of the will of the said *Edwin* by G. and E. the executors of the same will, in due form of law.— to which declaration the defendant demurred; for that the administration granted to the plaintiff had ceased. I, of counsel with the defendant, insisted, that the declaration was ill; for it appears that *Dutton Stede*, during whose minority the administration was granted, had attained the age of seventeen years before the action commenced, and then the authority of the administrator ceases, according to *Pigot's* case, 5 Co. 29. a. Cro. Eliz. 602. But a diversity seems to be understood on the

Administration *durante minore etate* of one intitled to the administration doth not determine until the infant hath attained the age of twenty one.
1 Ld. Raym. 667. S. C.
1 Salk. 39. S. C.
12 Mod. 500. S. C.
1 Ld. Raym. 408.
Lutw. 677. S. C.
4 Burn's Eccl. Law. 238
1 Com. Dig. 250. 262.
5 Com. Dig. 207.
Harg. Co. Litt. 89. b. n. 6.
Infrs, p. 159.

FRISKE v.
THOMAS.

[111]

other side, between where an administration is granted during the minority of an executor, and where it is granted during the minority of one who is entitled to have administration; for the declaration takes notice, that the executors of Sir *Edwin Stede* refused, and that *Dutton Stede*, during whose minority the administration was granted, was the principal legatee, and so (as it seems) intitled to the administration: but I think this does not make any difference; for the reason why the authority of an administrator *durante minore etate* ceases, when the infant attains the age of 17 years, is, that by the spiritual law, at that age he is capable of making a disposition of the goods of the deceased for the benefit of the deceased, and to take the administration upon himself. But this reason is of the same weight, as well when the minor is an administrator, as when he is executor, for the power of the one and the other is the same; and an administrator in the civil law is called *executor dativus*; the person from whom the authority to administer is derived, who is the deceased, or the ordinary, is not regarded, but that person only to whom such authority appertains, whether he be of age sufficient to administer; and therefore if an administration is granted during the minority of a woman, and she takes a husband of the age of seventeen years, the administration ceases; as it was held 5 Co. 29. b. *Prince's case*; by which it appears, that no more regard is had of a person appointed to take the administration by the deceased, than there is of a stranger. And this distinction was not known to *Vaughan C. J.* for he thought, that an administrator *durante minore etate*, if he brought an action, ought to aver, that the administrator or executor was under the age of seventeen years. *Vaugh. 93. (a) Edgcomb and Dee.* There an action upon the case was brought against an administrator *durante minore etate* of *Charles Everard*, the son of the intestate: the defendant pleaded several judgments against himself, and no assets *ultra*. And upon a demurrer to the plea an exception was taken, that the judgments pleaded did not appear to be against him as administrator *durante minore etate*. But the exception was not allowed; for that there is no need, in an action brought against an administrator *durante minore etate*, for the plaintiff to shew that

(a) 1 Lev.
281. S. C.
2 Lev. 39. S. C.
1 Vent. 198.
S. C.
2 Keb. 860.
879. S. C.
3 Keb. 15. S. C.

that the administration is not determined; but in an action brought by an administrator *durante minore etate* he ought to aver, that the administrator or executor is under the age of 17 years; and that an administration hath been granted to a person in his infancy. *Cro. Eliz.* 541. *Bade and Starkey*. If it is objected, that by the statute of 22 & 23 Car. 2. c. 10. Ordinaries in granting administration shall and may take of the person to whom administration is granted sufficient bond, &c. which bond an infant cannot give; it is to be observed, that the statute does not intend to make any alteration in the persons to whom administration is to be granted, but only to require a caution of the administrator, which if he cannot give, it ought to be taken of his surety in his stead; and it must be observed, that an administration *durante minore etate* granted after the infant is seventeen years of age is void. 5 Co. 29. a. *Pigot's case*. But judgment was given for the plaintiff; for there was always a diversity between the cases where an administration is granted during the minority of an executor, (which ceases at the executor's attaining the age of seventeen years) and where it is granted during the minority of one who is intitled to the administration, the which endures until the infant attains the age of twenty-one years; and so it was adjudged between *Atkinson and Cornish*, (a) and between *Dubois and Dubois*.

12 Mod. 194. S. C. Holt 43. S. C. Comb. 475. S. C.

FREER v.
THOMAS.

[112]
Administration granted during the minority of an executor, ceases upon his attaining the age of seventeen years.
4 Burr's Eccl. Law 238.
2, Jones 48.
2 Brownl. 248.
12 Mod. 438.

(a) 1 Ld. Raym. 338. 5 Mod. 395. S. C. Carth. 446. S. C.

Feltham *vers.* Cudworth. In B. R. Pasch. Case 73.

THIS was a *Scire facias* upon a judgment for 800*l.* against the defendant; who pleaded as to execution against his lands and tenements, goods and chattels, that he could say nothing to avoid it, but as to execution against his body, he pleaded a composition with two thirds in number and value of his creditors, and therefore that he was exempt from execution as to his body. To

Where a statute authorises a certain proportion of a man's creditors to enter into a composition with him, and declares that such a composition being entered into for the

equal benefit of all his creditors shall bind all, a composition to take a certain sum in the pound for the debts due to such of the creditors as should sign it, is a composition within the statute for the benefit of all the creditors, and all will be intitled to it. 7 Mod. 10. S. C. 3 Salk. 59. S. C. 1 Lord Raym. 760. S. C. t. 8 and 9 Will. 3. c. 18. repealed by St. 9 and 10 Will. 3. c. 29.

FELTHAM v.
CUDWORTH.

which it was demurred. And *Dee* Common Serjeant made the following objections to the plea. First, by the act of parliament the agreement ought to be by deed; for the statute says, by writing under their hands and seals, which in construction of law is by deed; and therefore the defendant ought to have pleaded it as a deed; and it is not sufficient for him to pursue the words of the act of parliament in this case; but it would have been sufficient if he had said, by a certain deed under their hands and seals, or by writing under their hands and seals, and afterwards delivered; and he ought in pleading to have shewn that the composition was by a deed. Secondly, then if the composition was by deed, there ought to have been a *profert hic in cur'*. Thirdly, it is not sufficient, that the composition was for the equal benefit of all the creditors, but it ought to appear to be for their equal benefit; but here is 2*s.* in the pound allowed to the creditors who subscribe, but it is not said, that it was for the benefit of the others who did not subscribe. Fourthly, it does not appear when the 2*s.* in the pound shall be paid; for by the agreement it does not appear that he ever was in prison, and by the agreement the payment is to be made within five years after his discharge; and for that it doth not appear that the defendant ever was in prison, it does not appear that the composition shall ever be paid. *Sed not allocatur*; for as to the first objection, it is sufficient to pursue the words of the statute, and as to the second, there is no need to have a *profert hic in cur'*. *Mod. Ca.* 58. (a) And if the composition be made to the equal benefit of all the creditors, it is good, although it be not said in the agreement that the payment shall be to all; for those who subscribe cannot bind those who do not subscribe; but the act of parliament requires the same payment to be made to all, as is agreed to be paid to the subscribers. And *Holt* C. J. said, that the composition upon the act of parliament is in the nature of a defeazance, and the first security was in force; and therefore if there was a bond for 100*l.* and a composition for 2*s.* in the pound, an action might be brought upon the bond, and the bond would be defeazanced by the composition;

[113]

Instrument of composition with creditors need not be pleaded with a *Profert in Curiam*.
2 Raym. 763.
(a) 6 Mod. 58.
2 Ld. Raym. 967.
5 Com. Dig. 129.

FELTHAM v.
CUDWORTH.

composition; but as to the last objection, that there appears to be no day of payment, *dubitatur*; and therefore it was adjourned. (1)

(1) Judgment was given in this case for the plaintiff. The reasons which induced the judges to decide against

the defendant are fully stated in 2 Raym. 760.

Gree *vers.* Rolls. In B. R. Hil. 8 W. 3. (1) Case 74.

THIS was an action of ejectment. On a special verdict the case was attempted to be moved, but was stopped by Mr. Broderick; for here was a declaration against two defendants, Sir John Rolls and Mr. Newell; at the assizes one of the defendants did not appear, and a *Nolle prosequi* was entered against him, and the other did appear, and a verdict was brought in, which could not be right in an ejectment, where the term is joint, for then, by the default of one of the defendants, the whole term would be recovered against the other: it may be otherwise in trespass whether the trespass is several, (a) and each party must answer for himself; but that cannot be in ejectment according to the case 2 Leon. 199. *Holland and Drake*. But in such a case Holt C. J. said, that if one defendant appeared and confessed lease, entry and ouster, and the other did not appear, he would direct the jury to find as to the defendant who did not appear, not guilty, if nothing was proved against him. *Sed adjournatur*. (2)

In an ejectment against several, if one only confesses lease, entry and ouster, and the others do not, how the verdict shall be.
1 Ld. Raym. 716. S. C.
12 Mod. 651. S. C.
2 Salk. 456. S. C.

(a) Cro. Eliz. 762.
Carth. 21.

[114]

(1) This case is more fully reported in Ld. Raym. and 12 Mod. where among other points it is determined "that the entry of *Cestuy que trust* is sufficient to avoid the Statute of Limitations. 21 Jac. 1. c. 16.

(2) Judgment in this cause was given, contrary to Holt's Ch. Just. opinion,

for the plaintiff. And afterwards error was brought upon this judgment in parliament. And the judgment of the King's-bench was affirmed *Saturday* the 18th of April, 1702, and 50 l. costs given to the defendant in error. 1 Ld. Raym. 718.

Case 75.

Baily *vers.* Cheeseley. In B. R.

A clause in the condition of an arbitration bond that the obligor will consent to have the submission made a rule of Court, determined to be a consent for that purpose.

1 Ld. Raym.

674. S. C.

1 Salk. 72. pl. 8.

S. C.

1 Com. Dig.

379.

1 Bac. Abr. 134.

1 Crompt. Pr.

262.

(a) St. 9 & 10
Will. 3. c. 15.

IT was moved to make a submission to an award a rule of the Court, upon an Affidavit that it was so agreed at the time of the submission; and the bond of arbitration being produced, it appeared to be with condition that the party should stand to the award, and would consent to have it made a rule of Court, otherwise the condition to be void. And it was insisted that there was no consent, but only a penalty in case he would not consent afterwards, and by the statute (a) it ought to be a present consent; and if it was not so at the time of the submission, it never can be made so. But the Court was of opinion that this condition was a consent, otherwise it was of no signification, and that if there was not a consent to make the award a rule of Court, there is no submission, for the submission is contained also within the condition of the obligation. (1)

(1) The Court held, in the case of *Harrison vers. Grundy*, that they could not receive any complaint to set aside an award, until the submission was made a rule of Court; and that a con-

sent in the submission bond, to make the award a rule of Court, instead of the submission would not warrant their interposing. 2 Str. 1178.

Case 76.

Warner *vers.* Green. In B. R.

After a verdict a declaration in an action on the case for a way, was helped, tho' the particular sort of way was not shewn.

THIS was an action upon the case for stopping up a way; and the plaintiff declared that he was seised of eighteen messuages in *St. Buttolphs Aldgate*, and prescribed for a way from every one of those messuages over a certain vacant piece of ground, &c. to such a place; and after a verdict for the plaintiff, it was objected that it was not shewn what sort of a way he had, whether a foot-way, horse-way or cart-way. *Sed non allocatur*; for it is said that he had a way *ire & redire*, &c. and after a verdict it shall be intended a general way for all purposes.

Sterling *vers.* Tanner. In B. R.

Case 77.

THIS was Error of a judgment in *C. B.* and the plaintiff assigned for error, the want of an original; and then the courtes, that the defendant shall give a rule to the plaintiff to get a certificate whether there was an original; upon which the plaintiff shall take out a *Certiorari* to inquire whether there was any original of that term of which the *Placita*, &c. are entered, which in the present case was *Trinity Term*. But here in this case the defendant did not give any rule, but at his own proper charge took out a *Certiorari*, and procured a certificate of an original, But by the Court this is ill, for the error is not completely assigned until the certificate is returned, by which it appears that there was no original in the case.

Error for want of an original, is not completely assigned until the certificate is returned.
 1 Rich. Pr. K. B. 545.
 2 Crompt. Pr. 361.
 Imp. Inf. Cler. K. B. 601.
 2 Ld. Raym. 1156.
 1 Salk. 267.
 S. C.
 Holt 274. S. C.

Lamplugh *vers.* Shortridge. In B. R.

Case 78.

THIS was an action of covenant. The defendant pleaded a release and confirmation, &c. to which it was demurred *quia duplex & caret formā*. But by the Court, this is a general demurrer, for the demurrer ought to shew in what the duplicity consists, and upon a general demurrer, duplicity is not fatal.

On a general demurrer duplicity is not fatal.
 1 Salk. 219.
 3 Salk. 141.
 S. C.
 Lutw. 4.
 6 Mod. 118.
 Hob. 232.
 1 Lev. 76.

1 Saund. 337. 2 Raym. 802. 5 Com. Dig. 140. 4 Bac. Abr. 119. 134. Infra p. 229.

Palmer *vers.* Stavely. In B. R.

Case 79.

THIS was an action on the case upon an *Indebitatus Assumpsit* for money had and received by the defendant for the plaintiff, *ad usum ipsius* the defendant, where it was intended to have been "to the use of the plaintiff;" and after a verdict, it was moved in arrest of judgment, for that the plaintiff had declared of money had to the use of the defendant, and therefore had no cause of action of his own shewing, for the money being received to the use of the defendant the plaintiff cannot recover it. *Sed non allocatur*; for after a verdict for the plaintiff, the words *ad usum defendantis* shall

After a verdict the words *ad usum defendantis*, instead of *ad usum querentis*, shall be rejected.
 1 Raym. 669.
 S. C.
 12 Mod. 495.
 510. S. C.
 1 Salk. 24. S. C.
 Infra p. 557.
 5 Com. Dig. 115.
 4 Bac. Abr. 96.

PALMER v.
STAVELY.

shall be rejected, for a verdict could not have been found for the plaintiff, if evidence had not been given that the monies had been received for his use; and the declaration further says that the monies were received for the plaintiff, and so the subsequent words, *to the use of the defendant*, shall be rejected; and to this purpose were cited the cases between (a) *Norworthy* and *Wildman*, 1 Mod. Rep. 42. (b) 1 Sid. 306. and a case in this court between *Pattison* and *Milton*, (c) *W.* 3. (d) where a declaration that the plaintiff assumed to the plaintiff was aided after a verdict.

- (a) 2 Keb. 615.
(b) 2 Keb. 97.
S. C.
(c) Hil. 4. & 5
W. & M. in
B. R. 1693.
(d) 4 Mod. 161.

Case 80.

May *vers.* King. In B. R.

Indebitatus assumpsit for the use of a chariot for a year. After a verdict the declaration was holden good, though it did not aver that the defendant had the use of the chariot for the year. Vide supra 115. 1 Ld. Raym. 680.
12 Mod. 537.
S. C. but not S. P.

THIS was an action of *Assumpsit*, wherein the plaintiff declared that in consideration that he had delivered to the defendant a chariot, and had agreed to permit him to have the use of it for one year, the defendant promised to pay 200 l, but it was not alledged that the defendant had the use of the chariot for a year; and this after a verdict for the plaintiff was moved in arrest of judgment. *Sed non allocatur*; for after a verdict it shall be intended that he had the use of it for a year, as it appears that the chariot was delivered to him.

Case 81.

Lancashire *vers.* Kellingworth. Executors of ——. In B. R.

Plaintiff declares that defendant's testator agreed to pay 2000 l. to the plaintiff upon his transferring so much stock, and then avers that he was ready and offered to make a transfer, and that the testator was not willing to accept of it. It was determined, First, That where a man is to pay money upon an act being performed, and there is a tender of performing the act, and a refusal, it is equivalent to its having been done. 12 Mod. 529. S. C. 1 Ld. Raym. 686. S. C. 2 Salk. 623. 3 Salk. 342. S. C. Say. Rep. 189.

THE case appeared to be this upon the declaration: The testator covenanted with the plaintiff, upon the transferring so much stock in the *Hudson-Bay* Company, to pay 2000 l. and the plaintiff avers that he was ready and offered to make a transfer, but that the testator was not willing to accept of it. And *Holt* C. J. delivered the opinion of the

whole

whole Court ; and he said that if a man is to pay money upon an act done, and there is a tender of doing it, and the party refuses, it is *tantamount* as if it had been done ; but here the tender is not well alledged, for the plaintiff says, that he was ready, and the defendant was not willing to accept, and whenever a man pleads a tender, he ought to plead a refusal also. 1 *Sid.* 13. 2 *Saund.* 350. 1 *Vent.* 177. 214. S. C.

Then if the defendant was not present, and for that reason he could not refuse ; the plaintiff ought to shew that the defendant had notice, and that the plaintiff was ready, and no defendant came, &c. *Yelv.* 38. 1 *Cro.* 754. S. C. (q)

And if it is pleaded that the defendant had notice and did not come, it ought to be shewn when and at what time the plaintiff was ready, *viz.* that he attended to the last part of the day. 5 *Co.* 114. b. *Wade's case.*

And in such cases the later way of pleading is, that the defendant did not come, nor any other for him, though this is not of necessity ; for if a man pleads a tender and refusal, it is sufficient to shew the refusal, without saying at what time the refusal was, for a refusal by the party at any time or place is sufficient ; but if a man pleads notice given, by which it appears that the defendant was not present when the act ought to have been done, then the plaintiff must say that he was ready at such a time, *viz.* to the last part of the time when the thing was to be done, and that the defendant or any for him did not come ; and the reason of all those cases is, that when the plaintiff himself is to do an act, and that act is not done, he ought to shew to the Court that he had done every thing that was in his power. *Hob.* 107. 1 *Cro.* 694. 8 *Co.* 92. And therefore judgment was given for the defendant by the whole Court.

LANCASHIRE
v. KELTING-
WORTH.

[117]
Secondly, When a tender is pleaded, a refusal ought also to be averred.
Thirdly, And if the party is absent, it ought to be shewn that notice was given to him.
(a) *Cro. Jac.* 127. S. C.
Fourthly, Tender must be alledged to be at the last convenient time of the day. *Vide supra* p. 90.
Infra p. 174. 2 *Str.* 777.
5 *Com. Dig.* 45. *Dougl.* p. 686.
Fifthly, A tender pleaded, and that the party was not there to receive it, is good ; without saying, nor any one else for him.
Cro. Jac. 13.

Where a person agrees to do a thing, he must shew that he has done all in his power to perform it.

Case 82.

Parsons *vers.* Gill. In B. R. (1)

A writ of execution may bear teste the first day of the term of which the judgment is entered.

1 Ld. Raym.

695. S. C.

2 Show. 485.

Skin. 257. S. C.

3 P. Wms. 399.

note c.

2 Salk. 87.

2 Raym. 766.

249. S. C.

7 Mod. 2. 93.

S. C.

2 Str. 282. Barnes 266. 268.

[*118]

IT was moved to refer the regularity of a judgment in debts the declaration was of *Hilary* Term, and judgment by confession which was signed after the term; and after the signing, *viz.* on the 10th of *April*, the defendant died, and the execution bore teste the 23d of *January*; and it was insisted that it appeared that the execution was before the judgment. *Sed non allocatur*; for execution may be sued out * after the death of the defendant, except against a purchaser, and the writ of execution may bear teste of the precedent term, even of the first day of that term.

(1) This case is very differently reported in *Lord Raymond*.

Case 83.

Sir Richard Levin *vers.* —. In B. R.

In error for want of an original another original was allowed by the Court of Chancery, on an Affidavit that instructions were given to the Cursitor for one, and that they were lost.

1 Raym. 695.

S. C.

12 Mod. 561.

S. C.

1 Rich. Pr.

K. B. 546.

2 Croamp. Pr.

361.

1 P. Wms. 411.

THIS was Error of a judgment in *C. B.* in an action of Covenant. The plaintiff in error assigned for error the want of an original, and had a *Certiorari* upon which it was certified, that there was no original; afterwards the defendant applied to the Court of Chancery, and upon an Affidavit that instructions were given to the Cursitor for an original, but that they were lost, the Court of Chancery allowed that the original should be supplied; upon which the defendant in error prayed another *Certiorari*, and an original was certified of the same term in which the default of an original was certified before; and now it was moved by Mr. *Broderick* that this was irregular, for before the second *Certiorari* was returned, the defendant ought to have given a copy of the original to the attorney of the plaintiff; and the Master informed the Court that the course was so, when the second original certified was of another term; but it being in this case of the same term, the motion was not allowed.

D E

Term. Sanct. Trin.

1 Annæ. In B. R.

Machell *vers.* Clerk.

Case 84.

THIS was Error of a judgment in *C. B.* in an action of Ejectment; where upon a special verdict the case appeared to be this: *John Machell* seised of the land in question in tail, by indenture covenants to stand seised thereof to the use of himself for life, and after to the use of his eldest son and the heirs of his body, then to his second son, and so to all his issue successively in tail; and on the 25th of *January* then next following he covenants to suffer a common recovery to other uses in fee, which recovery was had accordingly; in which *A.* was demandant against *John Machell* tenant, who vouched the common vouchee; and whether this recovery was good was the question; for if by the covenant to stand seised to the use of himself for life, &c. he was only tenant for life at the time of suffering the common recovery; then that recovery did not bar the estates of his issue, because it was suffered with a single voucher only, *John Machell* not being vouchee, but only tenant to the *precipe*; but if the covenant to stand seised did not alter the estate-tail, but that *John Machell* after such covenant, and at the time of the recovery, remained seised of the estate-tail, the recovery was sufficient to bar the issue in tail. And after judgment for *Clerk* (who claimed under the recovery) in the Common Pleas, it was several times argued in *B. R.* And now *Holt C. J.* delivered the judgment of the Court, that the judgment in *C. B.* should be affirmed. And

he

Tenant in tail covenants to stand seised to the use of himself for life, with remainders, and afterwards suffers a recovery to other uses; the uses on the recovery held good.
 2 Salk. 619.
 S. C.
 Holt. 615, S. C.
 7 Mod. 18.
 S. C.
 11 Mod. 19. S. C.
 2 Ld. Raym.
 778. S. C.
 Vin. Abr. Tit. (U. 2.) pl. 7.
 Will. on Rec. p. 247.

**MACNELL v.
CLERE.**

If tenant in tail bargains and sells or makes a lease and release to another in fee, the bargainee or releasee has a base fee not determined nor determinable until the entry of the issue.

Pow. on Dev. 36.

2 Salk. 619. S.C.

Holt 616. S.C.

7 Mod. 23. S.C.

2 Ld. Raym.

779. S. C.

Plowd. 557.

1 Atk. 4.

2 Burr. 707.

3 Burr. 1705.

Vin. Abr. Tit.

Devis.

(L. 3.) pl. 31.

Dower. (G.)

pl. 49. *Estate.*

(G. a.) pl. 17.

(L. a.) pl. 8.

Grants. (H. 9.)

pl. 11. *Infra*

p. 129. 130.

(a) 1 Bulst. 162.

S. C. Jenk.

Cent. 51. S. C.

And if tenant

in tail levies a

fine to the bar-

gainee, the issue

cannot avoid it.

Cro. Jac. 689.

If tenant in tail

makes a lease for

years and dies, it

is only voidable.

Holt 617. S. C.

7 Mod. 25. S. C.

Infra p. 303.

(b) *Sr. Westm.*

2. 13 Edw. 1.

c. 1.

The bargain and

sale or lease and

release of a tenant in tail does not work a discontinuance. Vin. Abr. Tit. Abeyance. (B.) pl. 8.

14. Fines. (D. 3.) pl. 8. (H. a. 2.) pl. 2. Co. Litt. 331. a. n. 1. 2 Ld. Raym. 780. S. C.

he said, that all the Judges of the court, viz. *Littleton, Pouys* and *Gould*, agreed with him, that the judgment should be affirmed: as to the reasons of their judgment, he had not conferred with them, but that he thought it very reasonable, that the reasons and grounds of his own opinion should be declared in this case; and he was of opinion, that if a tenant in tail bargains and sells, or makes a lease and release to another in fee, that the bargainee or releasee hath a base fee, and his estate is not determined by the death of the tenant in tail, but descends to the bargainee or releasee and his heirs, till that estate is avoided by the entry of the issue in tail; and herein he relied upon *Seymour's case*, 10 Co. 96. (a) If a tenant in tail bargains and sells to one and his heirs, the bargainee hath an estate to him and his heirs; and if afterwards the tenant in tail levies a fine to the bargainee, it corroborates the estate of the bargainee; so that although before it was determinable by the issue after the death of tenant in tail, after the fine the issue in tail cannot avoid it; (1) and upon the case of *Fines*, 3 Co. 84. and the common case demonstrates it: if tenant in tail makes a lease for years and dies, the lease is not void, but only voidable; for if the issue in tail confirms it by the acceptance of rent, it is good for the time, and cannot afterwards be avoided: then if his lease conveys an estate which is not determined by his death, there cannot be any reason to say, that his lease and release shall not convey an estate which will have a continuance until it is avoided by his issue; and this is not inconsistent with the Statute (b) *de donis*; for although that statute says, that a tenant in tail shall not alien, yet by his feoffment he made a discontinuance, and put the issue to his action of *Formedon*; and the intent of the statute is answered, when the alienation may be avoided by the action of the issue.

The bargain and sale, or lease and release of a tenant in tail,

(1) If the fine had been levied before the bargain and sale it had been a discontinuance, but by the bargain and

sale being made previous to the fine, the bargainee had a fee determinable upon the entry of issue. Jenk. Cent. 51.

MACNELL v.
CLERE.

does not make a discontinuance : but it may amount to an alienation of the inheritance which was in him, notwithstanding the statute ; for as the Statute *de donis* is satisfied when the alienation by the feoffment is avoided by the *Formedon* of the issue ; by the same reason it is satisfied when the alienation by bargain and sale or by lease and release is avoided by the entry of the issue. The case was : tenant in tail bargained and sold an advowson to one and his heirs, and afterwards died ; the estate of the bargainee was not absolutely determined, although it was of a thing which lay in grant. 3 Co. 84. As to the case in *Litt.* —. (a) (2) and the case of *Took and Glasscock*, (b) 1 *Saund.* 261. where it was resolved, that nothing passed but for the life of the tenant in tail ; *Littleton* there is repugnant to himself, and *Hobart* (c) said, that he confounded himself ; and the case 1 *Saund.* afterwards resolved, that if a tenant in tail, after a bargain and sale to another and his heirs, levies a fine to a stranger, such fine avails to make the estate of the bargainee good to him and his heirs ; but how can a fine to a stranger enure to the benefit of the heir of the bargainee, if the bargain did not give a base fee to the bargainee and his heirs.

[121]

(a) Co. Litt.
Sect. 613.
(b) Carter 208.
S. C.

(c) Hob. 338.

But in the case in question, where tenant in tail covenants to stand seised to the use of himself for life, the remainder to his issues in tail ; this is absolutely void, for the covenant to stand seised to the use of himself for life cannot be of any avail, only as it was necessary to support the remainders dependant thereupon : but the remainder here limited after his death is absolutely void ; as if a tenant in tail made a lease to commence after his death, the lease would be absolutely void, although a lease for years made by him *in presenti* hath continuance after his death, if it be not avoided by his issue.

If tenant in tail
make a lease to
commence after
his death it is
void.
Vin. Abr. Tit.
Estate.
(l. a. 2.) pl. 26.
2 Ld. Raym.
781. S. C.
Cro. Jac. 455.

(2) The expression in *Littleton*, that tenant in tail cannot grant or alien or make any rightful estate of freehold to another person, but for the term of his own life, is not to be understood literally, that the grantee has but an estate for life, and that his estate is *ipso facto* determined by the death of the tenant in tail ; all that is meant by it

is, that his estate is certain and indefeasible, no longer than the life of the tenant in tail, for upon the death of the tenant in tail it is defeasible by the issue, either by action, or by entry or claim on the lands at his election. Still it has a continuance until it is so defeated by the issue. Butl. Co. Litt. 331. a. n. 1.

**MACHELL v.
CLERK.**

If tenant in tail covenant to stand seised to the use of one and his heirs, this passes a base fee to the *Cestuy que use*. Butl. Co. Litt. 331. s. N. 1. 2 Ld. Raym. 782. S. C.

And if there is a covenant to stand seised to the use of another and his heirs; this is good, and passes a base fee to the *Cestuy que Use*.

And if a tenant in tail by bargain and sale, or by lease and release, conveys to another and his heirs, to the use of himself for life, remainder to another; the remainder is good, because of the transmutation of the possession.

So if he covenants to stand seised to the use of *A.* for life, remainder to *B.* and his heirs; it is a good remainder, although the tenant in tail dies during the life of *A.* until it is avoided by the issue.

Where a tenant in tail covenants to stand seised to the use of himself for life, remainder to another the remainder is void.

Cruise on Re-

cov. 203. 7 Mod. 26. S. C. Vin. Abr. Tit. *Remainder*. (U.) pl. 1.

* But if he covenants to stand seised to the use of himself for life, remainder to another; that remainder is void in the commencement, and nothing passes by the covenant; and therefore the recovery here was good. And the judgment was affirmed by the whole Court.

[*122]

Cafe 85.

Smith verf. Walgrave. In B. R.

Plaintiff in replevin shall not pay costs when the writ abates. 2 Ld. Raym. 788. S. C. 2 Com. Dig. 548. 1 Bac. Abr. 522. Sayer's Law of Costs, 104. Cro. Jac. 473.

THIS was an action of replevin. The plaintiff declares for the taking of his cattle in a certain place called *B.* The defendant pleads in abatement, (1) that he took them in a certain place called *C.* *absque hoc, quod cepit in præd' loco vocat' B. prout, &c. et pro returno habendo* he avows, &c. The plaintiff confessed the caption to be in *C.* and thereupon the avowant had judgment that the writ should abate, and for the return of the cattle. And now it was moved by *Eyre*, that the avowant should have his costs. But it was resolved by the Court, that he should not have costs; for the Statute of 21 H. 8. c. 19. does not extend to this case, but gives costs only when the plaintiff is nonsuited; and the Statute of 7 H. 8. c. 4. gives costs only

(1) It is laid down in the case of *Bullisborpe verf. Turner*, Barnes 353, "dered as a plea in bar, and not in abatement," "that *cepit in alio loco* is to be confi-

when the plaintiff is barred ; but here the plaintiff is neither barred nor nonsuited, (2) but the writ only abates ; and he may have a new writ, and is not put to his second deliverance.

SMITH v.
WALGRAVE.
1 Str. 638.

(2) *Quere*—For this has very much case the defendant should have costs.
the appearance of a nonsuit, in which 2 Ld. Raym. 788. 3d edit.

D E

Term. Sanct. Hil.

1 Annæ. In B. R.

Case 86.

Redding *vers.* Roylton. In B. R.

If a man devise
lands to one of
several coheirs,
he shall take by
the devise and
not by descent.
1 Salk. 242,
423. S. C.
2 Eq. Abr. 333.
pl. 1. S. C.
2 Ld. Raym.
829. S. C.
Pre. Ch. 282.
S. C.
Harg. Co. Litt.
12. b. n. 2.
P. w. on Dev.
441.
1 r. Wms. 475.

THE case was : A man seised of lands in fee, had issue two daughters, one of which had issue a son and died ; the grandfather makes his will, and thereby devises the land to the son of that daughter and his heir ; then the devisee dies, leaving his aunt and grandmother ; the grandmother enters and enjoys a third part of the land as for her dower, and pays one moiety of the residue of the profits to the issue of the devisee, and the other moiety to the issue of the other daughter, and dies. The son of the devisee enters, and claims the whole by the devise, and therefore brought his ejectment against the son of the other daughter, who claimed the moiety by descent ; and whether by this devise the lands should go to the heir of the devisee, or descend to him, [as to one moiety] with his cousin, the issues of the two daughters as co-partners, was the question. And it was insisted, that when an estate is devised to the heir, it descends and does not pass to him by the devise. (a) But it was resolved by the Court, that the estate passed by the devise, and not by descent, for the reason why an heir, to whom land is devised by his ancestor, takes by descent and not by devise, is, because the devise was not necessary, forasmuch as the same estate is given by the will, that would have descended ; but when the estate devised is altered in quantity or quality, the heir takes by devise ; now by this devise there is an alteration of the estate, for if the land

(a) 3 Com. Dig.
79.
1 Ld. Raym.
728.
2 Ld. Raym.
829.
3 Lev. 127.
Supra p. 72.
1 Str. 490.
8 Mod. 73. S. C.
Cro. E. ix. 431.
2 Bac. Abr. 80.

land descended, both the daughters would be but one heir and would take as copartners; but when a devise is made of all to one or the son of one of the daughters, then the devisee takes by purchase in a different manner from what would have been in case the land had descended; then it was argued that the plaintiff was barred by the (a) statute of limitations, for the profits of part of the estate were enjoyed by the son of the other daughter above twenty years. *Sed non allocatur*; for here was no ouster, and the statute of limitations does not extend to this case.

REDRING v.
ROYSTON.

(a) St. 21 Jac. 1.
c. 16.

1 Salk. 302,
423. S. C.
2 Ld. Raym.
830. S. C.
Co. Litt. 243. b.
5 Com. Dig. 476.

373. b. 3 B. Com. 170.

Hunt *vers.* Bourne. In B. R.

Cafe 87.

THE case was now argued *seriatim* by the court. And Gould J. was of opinion that the judgment should be affirmed, and as to the objection, that by the verdict it is not found, that there was a writ of right, he was of opinion that it was not needful, for in all special verdicts all necessary circumstances shall be intended. *Lanc.* 15. 9 Co. 51. b. As to the principal case he was of opinion, that by the first fine there was a discontinuance for the three lives, for notwithstanding the Statute 18 Edw. 1. *De modo levandi fines*, a fine may be well levied by antient demesne, for this statute does not extend to it. *Hob.* 47. 2 Inst. (a) 106. *Dyer* 373. True it is that it cannot be a bar to the issue in tail upon an estate-tail made by the statute (b) *de donis conditionalibus*; for a fine is no bar to such an estate but by the statute of (c) 4 H. 7. and (d) 32 H. 8. But it is objected, that a fine is levied upon a writ of covenant which is a personal action, and cannot be brought in antient demesne; but I am of opinion, that a writ of covenant for a fine is a real action, and here the fine is levied according to the custom upon a writ of right close, *Fitzb. Nat. Brev.* 11. but it is objected, that a court of antient demesne is not a court of record, yet a common recovery there binds the estate.

Vide *supra*.
P. 93.

(a) 2 Inst. 513.
Infra. p. 127.
Vin. Abr. Tit.
Fine. (a. 3.)
pl. 1. Sect. 6.
(b) St. Westm. 2.
13 Ed. 1. c. 1.
(c) St. 4 Hen. 7.
c. 24.
(d) St. 32 Hen.
c. 36.
A writ of cove-
nant for a fine is
a real action.
Fitz. N. B. 8 h
edit. p. 370.
343.
infra, p. 126.
127.
p. 27. (G.) pl. 4.

But I am of opinion, that this discontinuance determines with the three lives: If tenant in tail makes a lease for the life

HUNT v.
BOURNE.

(a) Co. Litt.
333. a.
(b) Co. Litt.
336. a.

of the lessee, this is a discontinuance of the estate-tail; but if the lessee dies, the discontinuance determines, *Co. Lit.* (a) and I am of opinion that the second fine does not make a discontinuance. 3 *Co.* 88, 89. (b)

(c) St. 21 Jac.
1. c. 16.

I also am of opinion, that the right of entry is not lost by the twenty years; the statute of (c) limitations does not bar the right, but only the remedy; if a lessee for life levies a fine, the lessor shall have five years after his death; for the right of the lessor is not barred by the non-claim of the lessee, or by that of himself, during the life of the lessee.

Powys J. was of opinion that the verdict was good; for it is found, that by the custom a fine may be levied upon a writ of right close, and that a fine was levied there according to the custom.

He thought also, that a fine may be levied in the court of Antient Demesne, especially, it being found by the verdict, that it was levied according to the custom beyond time of memory. *Hob.* 48. 1 *And.* 71. *Dy.* 372. There it was also said, that a fine in ancient demesne bars an estate tail; but 2 *Inst.* (1) takes notice of this case, and says, that a fine there does not bar the tail, but admits that a fine may be levied there.

(d) Co. Litt.
332. b.
(e) Co. Litt.
Sect. 619.
(f) The case referred to by our Author in this place, is that of *Saule* alias *Salvin* v. Clerk. 1 Jones, 208. Cro. Car. 156. Latch. 64. 72. Wm. Bent. 174.

He also was of opinion, that the fine in ancient demesne made a discontinuance, but it made a discontinuance only for three lives. And he held also, that the second fine did not make a discontinuance, for that it doth not take effect for the life of the conusor; and this is like the case, (d) *Co. Lit.* and the section (e) there, altho' it is not the text of *Littleton*, yet it is good law, and founded upon good reason; and is allowed for law, 1 *Jon.* 109. *Latch.* 69. in the case of *Eufpace* and *Scawen.* (f)

(1) The part to which our Author intended to refer, is, I apprehend, in the 4th Institute p. 270, where we find the following observation in point. "They (that is tenants in antient de-

mesne) may levy a fine in antient demesne which by the custom it is said to be a bar of the estate-tail; but certainly that will not hold."

He was of opinion also, that the ejectment is not barred by the statute of limitations, altho' the conusor died in the year 1656.

HUNT v.
BOURNE.

Then the issue might have a *Formedon*, but now this remedy is barred by the statute of limitations; for there was a discontinuance for the three lives, and the entry of the issue was taken away thereby, so that he could not have an ejectment until the determination of the three lives, when the discontinuance ceased, which was within twenty years.

[126]

Powell, J. I am fully of opinion, that a fine in antient demesne makes a discontinuance; for the Statute of 18 Ed. 1. *de modo levandi fines* was only a declaration of the common law, and does not restrain fines in antient demesne; for a fine in the Common Pleas levied of land in antient demesne makes it a frank fee, and is reverfable by the Lord in a writ of disceit; and it would be a hard construction of the Statute 18 Ed. 1. *de modo levandi fines* (even if it was introductive of a new law, and much more so as it is only declaratory of the law) to make it restrictive to fines in antient demesne, which cannot be levied any where else. Fines were leviable before the Justices in *Eyre*, and before *Magna Charta*, c. 11. in *B. R. Rastal's Entries* 585. b. but the Statute of 18 Ed. 1. intends only the restraint of fines in inferior courts upon bill or plaint there. The case 44 Ed. 3. 38. is not law; and no other case denies the power of levying fines in antient demesne; and this case is founded upon the mistake, that a writ of covenant for a fine is a personal action, when it is a real action. 1 *And.* 71. (a) 4 *Inst.* 207. *Kelw.* 90. b. Then this fine in antient demesne is a discontinuance, but it is a discontinuance only for the lives; for although a fine *come ceo*, &c. passes a fee generally, yet it is not so, when there is an express limitation for life. *Bro. Tit. Fine*, 12.

A fine levied of land in antient demesne in the court of Common Pleas makes it a frank fee, and the Lord has his writ of disceit to reverse it.
Cruise on Fines 96. F. N. B. 223. a.
2 *Inst.* 573.
4 *Inst.* 269. 270.
Holt. 60. S. C.
1 *Salk.* 57. S. C.
Vin. Abr. Tit. Antient Demesne (J.) pl. 4.
3 *Salk.* 35.
1 *Ld. Raym.* 177. S. C.
2 *Will.* 17.
Hob. 188.

(a) 1 *Roll. Abr.* 327.
4 *Inst.* 270.

Then the second fine cannot make a discontinuance when the estate was discontinued before.

Holt, C. J. I hold that a fine in a court of antient demesne is good, notwithstanding it is not a court of record; for this

Cruise on Fines. 95. 1 *Salk.* 340.
1 *Salk.* 34. S. C.
F. N. B. p. 25.

HUNT v.
BOURNE.

[127]

court can hold pleas in a writ of right, and give a final judgment there, and join the wife upon the mere right; for upon a writ of right close the plaintiff shall make protestation to prosecute it in the nature of a writ of right, *Dyer* 111. Then if it hath cognizance of a writ of right, which is an action of the highest nature, why shall it not levy a fine, which is not of so high a nature? It may be objected that *London*, and other antient cities and burghs, may hold plea in a writ of right, but cannot levy a fine; but the custom and usage are to be considered in this matter; for they hold pleas by reason of a grant or of a prescription, which supposes a grant of all pleas real, personal and mixt; but by such a grant before the Statute of 18 *Ed.* 1. *de modo levandi fines*, the power of levying fines did not pass; for it is a particular manner of action, which does not pass by a general grant. Then the city of *London* holds pleas in the same manner as the King's Bench or Common Pleas upon original writs; and if before the Statute 18 *Ed.* 1. the city of *London* could levy a fine, yet at the same time it might be levied in *C. B.* but a fine of land in ancient demesne could not, even before that statute, be levied in *C. B.* then in the courts of *London*, &c. If a plea there could be carried elsewhere, and the parties admit the jurisdiction, it is good; but if land lies in antient demesne, altho' the parties admit the jurisdiction of *C. B.* yet the fine shall be reversed: besides, if a tenant in antient demesne cannot levy a fine in the court of Antient Demesne, he will be under a greater disadvantage than other subjects are; for he cannot levy a fine in *C. B.* and the power of levying fines is a great advantage, because thereby purchasers are effectually secured; and it hath been a constant practice to levy fines there, tho' in some old books it is made a doubt of; as in 44 *Ed.* 3. 37. for a fine must be levied on a writ of covenant, which is a personal action; but that is a false foundation, for a writ of covenant for a fine is a real action. *Fitz. Nat. Brev.* 146. (a) And a fine may be levied upon any writ whatsoever. 5 *Co.* 39. a. *Kelw.* 90. b. That fines may be there levied it is agreed. 2 *Inst.* 514. (b) *Dyer* 373. And there the dispute was only, whether such fine barred the estate-tail.

(a) F. N. B. 8th.
edit. p. 343. F.
supra p. 124.
(b) 2 *Inst.* 513.
supra p. 124.

And

And it is to be considered what will be the effect of a fine in antient demesne, and I am of opinion that it shall have the same effect at common law as a fine of land that is frank-free would have at common law in *C. B.* and therefore a fine by a tenant in tail shall make a discontinuance in antient demesne as well as in *C. B.* For a recovery against tenant in tail puts the issue to its *Formedon* in antient demesne as well as in *C. B.* 7 *H.* 4. 3. *b.* 7 *H.* 7. 10. And if a recovery there in a writ of right or other action hath the same force with a recovery in *C. B.* why shall not a fine there have the same operation with a fine in *C. B.*

HUNT v.
BOURN.

Then the force of a fine levied there for three lives is to be considered. A fine *sur consufance de droit come ceo, &c.* supposes that the conufor hath a precedent estate by the livery of the conufee, and therefore a fine is improperly called a feoffment upon record, for there is a great diversity between a fine and a feoffment. If a man being disseised enters to make a feoffment and livery, this amounts to an entry, and passes the estate to the feoffee, but a fine by one out of possession passes nothing to the conufee, but only extinguishes the right of the conufor. 2 *Co.* 56. *a.* *Buckler's case.*

Vin. Abr. Tit.
Fine (A. 4.) pl. 9.
1 Salk. 340. S. C.
Andr. 327.

A fine by one
out of possession
passes nothing
to the conufee,
and extinguishes
the right of the
conufor.

But it may be objected, that the fine was levied before the steward and attornies, when the suitors are Judges of the Court; but the tenants who are suitors may make attornies by the Statute of *Merton*, (*a*) 20 *H.* 3. and those attornies may sit as Judges there.

(a) St. 20 *H.* 3.
c. 10. 2 Inst.
100. 225.
F. N. B. 59.
367.

Then it hath been objected, that a fine *Sur consufance de droit come ceo, &c.* imports a conveyance in fee, and this being for three lives is a contradiction, yet a fine *come ceo, &c.* may be qualified to a less estate, as appears by 41 *Ed.* 3. 14. *a.*

Vin. Abr. Tit.
Fine. (Z. 5)
pl. 7. (N. b. 3.)
pl. 1. 1 Salk.
340. S. C.
C. Litt. 9. b.

I also hold that this discontinuance determines with the three lives, for the lives make the discontinuance, then the estate being discontinued by the first fine, cannot be more discontinued by the second, and this is without question according to *Littleton*. (*b*)

Holt 255. S. C.
129]

(b) Co. Litt.
333. a. Sect. 62d.

I also hold, that the discontinuance by the first fine continuing, the second fine cannot make a discontinuance, although it

HUNT v.
BOURNÆ.

Vin. Abr. Tit.
Finc. (X. 2.) pl.
4. 1 Salk. 244.
§. C.

it is a warranty; for if tenant in tail, reversion in fee, makes a lease for life, and afterwards the reversion is granted with warranty, yet this does not make a discontinuance.

Then as to the Statute of Limitations, it is to be considered whether the issue in tail was ever bound by the Statute of Limitations.

Vin. Abr. Tit.
Limitations. (L.)
pl. 3.

And I am of opinion, that the *Formedon* was not barred, but if it was barred, yet when the three lives determined, a new right accrued to the issue, and he might enter and have his ejectment, for it is not of any consequence, that upon supposition that he was barred of his *Formedon*, to which he had a right, that therefore he must be barred of his right of entry, which at that time he had not.

Judgment was affirmed by the whole Court

Where a copyhold is intailed by custom, a common recovery in the Lord's Court will bar the issue in tail, and those in remainder.
2 Vern. 585.
705. 1 Eq. Abr.
384. E. pl. 1.

And in this case it was declared by Holt C. J. as his opinion *obiter*, that if a copyhold was intailed by custom, a common recovery in the Lord's Court, would bar the issue in tail, and those in the remainder, for if the intail of a copyhold is allowed, a common recovery to dock it ought also to be allowed.

That the privileges of lands in antient demesne must in their original have been conferred by act of parliament, for they could not commence by grant or prescription.

Supra p. 121.

If a tenant in tail grants *totum statum suum*, the estate-tail is not in abeyance, as *Littleton* and *Coke* speak, for if the grant be to the grantee and his heirs, it passes a base fee; so if tenant in tail releases all his right to a man and his heirs, a fee determinable upon his life passes; so also if a tenant in tail bargains and sells to a man and his heirs, and if the tenant in tail afterwards levies a fine to the bargainee, this does not make a discontinuance, for the base fee was before vested in the bargainee. 10 Co. 96. a. *Seymour's case*. If tenant in tail makes a lease of three lives pursuant to the statute, with warranty to the lessee and his heirs, this does not make a discontinuance,

Supra p. 120.

[130]

continuance, but the lease is good notwithstanding the warranty, and whenever the warranty makes a discontinuance, the discontinuance ceases by the release or extinguishment of the warranty. (2)

HUNT v.
BOURNE.

(2) This cause was afterwards brought into the House of Lords, where the Court of Common Pleas was affirmed. 1 Brown, P. C. 53.

Termino Pasch.

2 Annæ. In B. R.

Cafe 88.

The Queen *vers.* Burnaby.

In a conviction on the Stat. 43 Elis. c. 7. for cutting down trees, the number and quantity of the trees ought to be mentioned expressly.
1 Salk. 181.
S. C.
3 Salk. 217. S. C.
2 Ld. Raym. 900. S. C.
4 Burn's Just. 414.
4 Com. Dig. 137, 138.

A Gentleman is within the Stat. 43 Elis. c. 7. if he acts in a way which the statute prohibits.
4 Com. Dig. 138.

THIS was a conviction before the justices of the peace on the Statute of 43 Elis. c. 7. against such persons as shall cut wood, underwood, break hedges, &c. for cutting down several trees called lime-trees; and an exception was taken, that the conviction stiles the defendant Gentleman; which shews that the defendant was a gentleman, and the statute was intended against mean and disorderly persons only; and so he who hath ability to answer damages ought not to be convicted upon this statute, where he is ousted of a trial by a jury, and hath not opportunity to make out his title if he claimed property; and the stile and the preamble of the act, and also the Statute of 15 Car. 2. c. 2. shew that those acts were intended against lewd and pilfering persons, and then a Gentleman shall not be intended to be comprised within the meaning of them. *Sed non allocatur*; for the Court cannot distinguish between the ability of persons, and there is no certain rule or limit to determine by who are able to answer damages and who not; and if a Gentleman does a base or inferior act, his quality is not any excuse, but an aggravation of his offence: and the Court thought, that if the defendant claimed property before the justices, they ought not to have made the conviction; and if they proceeded to do it a prohibition lies, either before or after the conviction; and by the opinion of some, if property were alledged before the justices,

ices, who afterwards made the conviction; and awarded damages, an action would lie against him who took the damages. But here the conviction being removed by *Certiorari*, a prohibition cannot be. But by *Holt C. J.* the defendant may make a suggestion upon the roll of his property, by way of plea, (1) and thereupon it shall be tried; and *St. John's case*, 5 Co. —. (a) does not make to the contrary. But the other Judges seemed to be of a contrary opinion in this point.

THE QUEEN v.
BURNABY.

(a) 5 Co. 71. b.
Cro. Eliz. 321.
S. C.

Another exception was, that the offence is alledged to be at *Bampton* in the county of *Huntingdon*, and afterwards it is said, that the defendant *apud Bampton prad'*, &c. and *Bampton prad'* does not import *Bampton in Com' prad'*, for *Bampton* may extend to two counties, and part of it may be in *Huntingdonshire*, and part in another county. *Sed non allocatur*; for although it may be in two counties, yet *Bampton prad'* is no other than that *Bampton* which was before mentioned in the county of *Huntingdon*.

The third exception was, that the conviction was for cutting down several trees, and damages to 20 l. given, but does not shew the number of the trees, which ought to be the measure of the damages; and if an action should be brought for the trespass, this conviction cannot be pleaded in bar, for it will not appear that the conviction was for the same trees; and therefore the number and quantity of the trees ought to be mentioned expressly in the conviction, as well as in an action for the trespass; as in 5 Co. (b) *Plater's case*.

(b) 5 Co. 34. b.

And for this cause the Court was of opinion that the conviction was ill. (2)

(1) Lord *Raymond*, in his report of this case says that he "was informed that the Court did not give any positive opinion as to the plea, but that they seemed inclined as above, and that by the advice of the Court the parties consented to try in an action, whether the defendant had any right or no in the place where, &c. But Sir *Robert Barnard* dying soon after the term, the suit fell." p. 902.

(2) Upon the same principle the case

of *The King* vers. *Catherall*, reported in 2 Str. p. 900, was determined, where the defendant, who was convicted on the *Kensington* turnpike act, for refusing to account and pay over the money received by him as collector, was discharged, and the conviction was quashed, because no particular sum was specified, or the times when the money was charged to be received, so as to enable him to defend himself on a second charge.

Case 84. Sir Charles Hale *vers.* Owen. In B. R. (1)

A sheriff shall not take advantage of his own irregularity to excuse himself in an action.

1 *Ld. Raym.* 904. S. C. Com. Dig. Tit. Pleader (2 O.) 5th Vol. p. 221.

In an allegation that a writ issued out of Chancery (*recitando, &c.*) per good *præcepit* the King shall be considered as the nominative case to the verb *præcepit*.

1 *Ld. Raym.*

905. S. P.

2 Com. Dig. 40.

[* 133]

THIS was an action for a false return of a citizen to serve for the city of *Coventry*, and several exceptions were taken after a verdict to the declaration.

* First, that the declaration mentions, that the writ issued out of Chancery (*recitando,*) &c. and after the recital, then it says *præcepit*, &c. and so there does not appear any nominative case to the word *præcepit*. *Sed non allocatur*; for the King is before mentioned, and shall be the nominative case to the verb *præcepit*; so in a *præcipe quod reddat, præcipe A. quod reddat B.* 101. *quas ei debet & injuste detinet ut dicit*; there is no nominative case, yet it is good *Latin*; and *A.* shall be the nominative case to the words *reddat & debet*; and *B.* is the nominative case to the word *dicit*; so in pleading, *et hoc paratus est verificare unde petit judicium & dampna sua*, &c. no nominative case appears to the words *paratus est & petit*.

Other exceptions were taken to the declaration, for that the plaintiff had set forth the proceedings of the sheriff in his election, by which it appears that the sheriff did not proceed regularly to an election, and therefore there was no election, and then no action can be for a false return. *Sed non allocatur*; for the sheriff shall not take advantage of his own irregular proceeding to excuse himself from an action. But by *Holt C. J.* it was sufficient for the plaintiff in this case to have said that such a writ issued, and was delivered to the sheriff, upon which he proceeded to an election *secundum exigentiam brevis*, and that the plaintiff was *debito modo* elected.

But yet judgment was given for the plaintiff by the whole court.

1 *Ld. Raym.*

908. S. P.

In an action for a double return it is sufficient for the plaintiff to allege that he was duly elected, he need not state any thing to shew that the election was regular.

(1) This is an action upon the Stat. 7 and 8 Will. 3. c. 7. continued by the Stat. 12 and 13 Will. 3. c. 5. which was enacted for the purpose of preventing

false and double returns of Members to serve in Parliament. This case is much more fully reported in *Lord Raymond*.

(1) Coggs *vers*. Barnard. In B. R.

Case 90.

THIS was an action upon the case; in which the plaintiff declares that the defendant *super se assumpsit* to carry safely a hoghead of wine, and that by the default of the defendant the wine was lost; and after a verdict for the plaintiff, it was moved in arrest of judgment, that the declaration did not shew that the defendant was a common carrier, or that for any sum of money *super se assumpsit*, and so * there being no appearance of any *premium* given to the defendant, no action lies.

And it was resolved by all the Judges of the court, that the action lay, for here is a special undertaking. And although the defendant might have refused to carry the wine, yet as he made a voluntary undertaking to carry it safely, if he does not do it he shall be punished for the damage which the plaintiff suffers by his neglect.

There are six sorts of Bailments which are sufficient for the maintenance of an action. (2)

First, a naked bailment, when a man delivers goods to another to keep.

Second, when a man sends cattle to another which are profitable, *gratis*.

If a man, who is not a common carrier, and who is not to receive a premium, undertakes to carry goods safely he is answerable for any damage they may sustain through his neglect or default. 4 Vin. Abr. Tit. Bailments (C). pl. 1. 2 Raym. 909. S. C. Raym. Ent. 163. Holt 13. 131. 528. S. C. 1 Salk. 26. S. C. 3 Salk. 11. 268. S. C. 1 Com. Dig. 203. Bull. Ni. Pri. Edit. 1790. p. 71. Cto. Jac. 668. 1 Bac. Abr. 243. Jones on Bail. 58. 1 Pow. on Cont. 366.

[* 134]

(1) The report of this case in Lord Raymond is much fuller and more satisfactory than this; the learned editor of Coke upon Littleton speaking of Lord Holt's argument upon this subject says, "Lord Chief Justice Holt's argument in that case, as reported by Lord Raymond, particularly merits attention, it being a most masterly view of the whole subject of bailment. Harg. Co. Litt. 89. b. n. 3.

(2) Sir William Jones in his excel-

lent treatise upon the Law of Bailments makes the following observation upon this division.—" This division (that is Sir John Holt's) of bailments into *six* sorts appears in the first place a little inaccurate; for in truth his *fifth* sort is no more than a branch of his *third*, and he might with equal reason have added a *seventh*, since the *fifth* is capable of another sub-division. I acknowledge therefore but *five* species of bailment." Essay on the Law of Bailment. p. 35.

Third,

'COGGES
BARNARD.

Third, when a man delivers goods or cattle to another for hire.

Fourth, when goods are delivered to another as a pledge.

Fifth, when goods are delivered to another to be carried for hire.

Sixth, when goods are delivered to another to be conveyed, or for a particular purpose without hire.

Jones on Bailm.
10. 46. 62.

If a man hath goods upon a naked bailment, he is not chargeable if they are lost, &c.

(a) 4 Rep. 83. b.
Cro. Eliz. 815.
S. C. (4)
Harg. C. Litt.
39. a. b.

Neither is he chargeable for a common neglect, and therefore *Southcot's* (a) (3) case is not good law, which says that a man shall be charged in an action on a general bailment; and it hath been the general practice for twenty years last past. If a man hath goods to keep, and they are stolen, although there be a neglect in him, as if he omits to shut the door, &c. he shall not be charged with them if he keeps them with the same care that he does his own. (5)

Id. Raym. 655.
913.
4 Burr. 2300.
2 Str. 1099.
12 Mod. 487.
H. Bl. Rep. 160.
Jones on Bailm.
45.

So if a man makes a bailment to another, and he makes an express promise to keep the things safely, yet he is not chargeable without his wilful default, for such promise shall not charge him further than he was chargeable before; it would not do so if it was in writing, and for the same reason it shall not do it, if it is by parol.

The second species of bailment obliges to a strict care, for if a man permit another to have his horse into the *West*, and

(3) That notion in *Southcot's* case 4. Rep. 83. b. that a general bailment, and a bailment to be safely kept is all one, was denied to be law by the whole court, *ex relatione m'ri Banbury*. 2 Raym. 911. note to 3d. edit. Jones 42.

(4) It is said in 12 Mod. 487. that *Croke's* report of this case is preferable to that by *Coke*.

(5) We find the following sentiment upon this subject in Paley's Principles

of moral and political philosophy, vol. 1. p. 172. "Whoever undertakes another man's business, makes it his own, that is, he promises to employ upon it the same care, attention and diligence, that he would do if it were actually his own; for he knows that the business was committed to him with that expectation. And he promises nothing more than this."

he rides to the *North*, and the horse dies, the bailee shall be charged for him.

COGGS v.
BARNARD.

But if such horse is stolen out of the stable without any fault in the bailee, he shall not be charged. 1 Com. Dig. 208.

Otherwise if he permit the door to be open and the horse is stolen, for then he shall be charged.

The third species of bailment is when goods are left with the bailee to be used by him for hire, and in this case the bailee is obliged to take the utmost care, and to return the goods when the time of hiring is expired. Jones on Bailm. 85.

The fourth species of bailment is as a pledge, and if the using of the thing will hurt it, the bailee must not use it. Jones on Bailm. 75.

But if the using will not hurt the things pledged, the bailee may use them, as jewels, &c. but if the bailee use them and they are lost, he shall answer for them; but if he does not use them, but keeps them in his chest, and they are stolen, he shall not answer for them. Infra p. 406.

If the keeping of the pledge is chargeable, then the bailee may use it, as if a cow is pledged, the bailee shall have the milk.

* But when the money is tendered for the goods pledged, and the bailee refuses to deliver them, then his special property is determined, and he by the detainer is a wrong-doer; and if the goods are afterwards stolen, he shall answer for them. 4 Rep. 83. b. 2 Salk. 522. Bull. Nl. Pri. 72. Jones 80. [*136]

The fifth species of bailment is, for carrying for hire; as where a man delivers goods to them who have a common or publick trust, as a common carrier or hoyman, &c. if these are robbed by enemies of the King, they shall not be answerable; otherwise if they are robbed by the violence of robbers. 4 Rep. 84. a.

So if the delivery be to a common factor, although he hath hire, he shall not answer for an act done without his default; as if the goods are stolen he shall not be chargeable. 4 Rep. 84. a.

COGS v.
BARNARD.

So in our case, according to the sixth sort of bailment, he (the defendant) should not be chargeable by an act which did not happen by his own default; as if any other had pierced the hogthead of wine, he should not be answerable for it.

Jones on Bailm.
52. 62.

When a man acts by commission, it obliges the person to take care, and he shall be answerable for goods which are lost by his neglect.

For the neglect is a deceit upon the person who trusts him; the party who intrusts expects diligence and fidelity of him who is trusted, and for breach of trust an action lies; as *Godb. 64.*

If the defendant had only offered himself to carry, there he would not have been chargeable, it would only have been a *nudum pactum*; but here, as he *super se assumpsit*, the word *assumpsit* imports an undertaking; and when a man undertakes to do a thing, and misdoes it, an action lies against him for that, though nobody could have compelled him to do the thing; and to prove this was cited 19 *Hen. 6. 49.* 11 *H. 4. 33.* (a) *Yel. 4. 128.* 2 *Cro. 667.* And judgment was given for the plaintiff.

1 Pow. on Cont.
345.
(a) Cro. Eliz.
283. S. C.

D E

Term, Sanct. Mich.

2 Annæ. In B. R.

Ewer *vers.* Jones.

Case 91.

A Prohibition was moved for to the admiralty court in a suit there for mariners' wages, and the defendant pleaded that it appeared by the libel, that the contract upon which the libel was founded was above six years before, and therefore by the statute of limitations the plaintiff was barred; this plea was there refused. And now on the motion for a prohibition it was urged, that a suit in the admiralty for seamen's wages is allowed there only for the convenience of their joining in the suit; but if the admiralty court will not admit a plea of the statute of limitations, which is a bar at common law, the defendant there will be greatly prejudiced; and this court will grant a prohibition.

The court was of opinion, that although in a cause originally suable in the admiralty, that court shall proceed according to their own law, yet when the admiralty court refuses to allow a plea in bar or proof pleadable and allowable at common law, this court hath a jurisdiction to prohibit them from proceeding; but in this case the statute of limitations is not well pleaded, for it ought to say that the cause of action did not arise within six years, and it does not appear to this court, for what cause the plea was disallowed there. And therefore a prohibition was not granted. (1)

Quære If the statute of 21 Jac. 2. c. 16. of Limitations extends to suits in the admiralty court for seamen's wages; If it does, a plea that it appears by the libel that the cause did not accrue within six years is bad. The defendant should state immediately that the cause in action did not accrue within six years. Vide Stat. 4 Ann. c. 16. s. 17. 6 Mod. 25. S.C. 2 Ld. Raym. 934. S. C. 3 Salk. 227. S.C. 2 Ld. Raym. 838. 1204. 2 Salk. 422.

(1) It was afterwards moved again but a prohibition was still denied; "but it seemed chiefly because the defendant had appealed; for a prohibition was

granted in Easter Term between *Hidd* and *Partridge* (a) in the same case," 2 Ld. Raym. 937.

(a) Holt. 428. 2 Ld. Raym. 1204. 2 Salk. 424. 3 Salk. 227. 11 Mod. 43.

Case 92.

Ward *vers.* Sir Stephen Evans. In B. R.

If a creditor desires his debtor to pay part of the debt to a third person to whom the creditor is indebted, and indorse it on a note from him to his creditor; If the debtor makes the indorsement, but refuses to pay the money, the third person may recover it from him in an action for money had and received.

2 Raym. 928.

S. C.

6 Mod. 36. S.C.

22 Mod. 521.

S. C.

Molt 120. S. C.

2 Salk. 442.

S. C.

3 Salk. 118.

S. C.

1 Com. Dig.

250.

3 Bac. Abr. 562.

(a) 1 Str. 415.

416.

Bayley on Bills

33.

If a servant who is sent to receive money, accepts a goldsmith's note instead of it, such acceptance does not bind his master.

10 Mod. 110.

1 Com. Dig.

250.

3 Bac. Abr. 562.

THIS was an action upon the case, in which the plaintiff declared upon an *indebitatus assumpsit* for money had and received to the use of the plaintiff; and upon the evidence at the trial, a case was referred to the judgment of the court, and appeared to be this : *Fellows* was indebted to the plaintiff upon bill of 60 *l.* who sent his servant to *Fellows* for the money, who gave him a note of *Sir Stephen Evans's* for 100 *l.* the servant carried the note to *Sir Stephen Evans*, whose servant indorsed 60 *l.* off the 100 *l.* note, and for the 60 *l.* gave the plaintiff's servant a bill of 60 *l.* 10 *s.* on one *Wallis*, a goldsmith, and the servant of the plaintiff paid to *Sir Stephen's* servant the 10 *s.* difference, and the next (a) morning went to *Wallis's* who had failed, and was a bankrupt; although for all the precedent day he had answered and paid bills; and when the plaintiff's servant found that *Wallis* was a bankrupt, he delivered back the bill upon *Wallis* to *Sir Stephen Evans*, who refused to take it, and insisted that the acceptance of the bill upon *Wallis* was payment of the 60 *l.*

And it was now resolved by the court in favour of the plaintiff; that the indorsement of the 60 *l.* off the bill of 100 *l.* was evidence of the receipt of so much money by *Sir Stephen Evans* for the use of the plaintiff; for the cash of *Fellows* lay at *Sir Stephen Evans's*, and his indorsement of 60 *l.* off from the 100 *l.* bill. (upon which the bill of the plaintiff for 60 *l.* upon *Fellows* was delivered up and cancelled) made a new receipt of so much money to the use of the plaintiff; then the delivery of the note upon *Wallis* for 60 *l.* 10 *s.* to the servant of the plaintiff, is not payment to the plaintiff, for he ordered his servant to receive the money, and not a bill, and then the receipt of a bill without the express authority of his master shall not bind the master. (1)

(1) It was also determined in this case that paper is no payment, where there was an original and precedent debt, for it is intended to be taken upon this condition (viz.) that the mo-

ney be paid in a convenient time. 3 Salk. 118. 2 Ld. Raym. 930. 8. C. 1 Com. Dig. 254. 1 Salk. 124. Skin. 410. Andr. 190.

D

Termino Pasch.

4 Annæ. In C. B.

Anne and Richard Fitzgerald, Executors of Richard Fitzgerald, *vers.* Cragg. Case 93.

THIS was an action of Debt upon a Bond made to the testator; after oyer of the obligation and condition, by which it appeared, that the defendant, and two others were named to be jointly and severally bound to the testator, the defendant pleaded in bar a covenant made by the testator to him, that he should not be sued upon this bond that was made by the defendant and two others. The plaintiffs reply, *non est factum testatoris*; whereupon issue was joined, and a verdict for the defendant. And now Serjeant Pratt moved, that the defendant might plead over again; for that he could not plead this covenant of the testator's in bar, but could only take advantage of that by action of covenant; (a) and the difference was, where a man makes a bond to a single person, and he makes a covenant that he will not sue the obligor; this may be pleaded in bar, for it amounts to a release and discharge of the action; but where there are more obligors, and the obligee covenants that he will not sue one of them, this will not amount to a release, for then all the obligors would be discharged; (1) but the defendant might have covenant if he be sued; and so it was resolved in the case of *Tracy and Kenaston*

In an action upon a joint obligation it must appear that all executed it, or otherwise it will be bad.

1 Ld. Raym.

419.

2 Salk. 573.

3 Salk. 298.

Holt 178. 218.

12 Mod. 221.

415. 1 Term

Rep. 446.

Cro. Car. 551.

(a) 1 And. 307.

Cro. Eliz. 352.

Carth. 64.

Comb. 123. S.C.

4 Bac. Abr. 101.

266. Bull. Ni.

Pri. edit. 1796.

p. 157.

(1) Where two are jointly and severally bound in a bond, a release to the one discharges the other. 1 Ld. Raym. 420. Cro. Car. 551.

FITZGERALD
v. CRAIG.

(a) 2 Salk. 575.

3 Salk. 29th.

1 Ld. Raym.

688. S. C.

12 Mod. 548.

S. C.

[*140]

(a) in *B. R. Trin. 13 W. 3.* which was entered *Mich. 11 W. 3. Rot. 193.* and so it seemed to be allowed by the Court. But *Trevor C. J.* objected, that it did not appear by the record, that the two others executed the bond; * for tho' by oyer of the bond it appears, that they are named in the obligation, yet if they did not seal and execute it, it will not avail; and this should appear by averment, or otherwise upon the record; for it does not appear, it shall not be intended: so it was adjourned. And afterwards in *Hil.* the 4th of the Queen, it was urged that the deed, in which the covenant was, recites, that the defendant, and the two others were jointly and severally bound to the testator, and thereupon he covenants not to sue the defendant upon the said bond, and that the defendant was bound by the recital, as a lessee would be estopped by a recital in a lease; but the Court did not much regard this. Then it was urged, that the covenant was not to sue upon the said bond, viz. upon the obligation, in which the defendant and two others were jointly and severally bound; that the defendant, in pleading this matter to the action of the plaintiff upon this bond, allowed it to be a bond in which the defendant and two others were bound, otherwise the covenant would not extend to it; and for this cause it was ordered that he should plead again.

D E

Term. Sanct. Hill.

4 Annæ. In C. B.

Barker and Ux' *vers.* Palmer.

Case 94.

IN a *Scire facias* upon a judgment in the Common Pleas by the wife whilst she was sole, the defendant pleaded a release; and an exception was taken that no place was alledged where the release was made, and it would be material upon a general demurrer. Resolved *Cro. Eliz.* 78. 98. admitted *Cro. Car.* 262. that the omission of a place is substance; and the case of *Kerby and Whitelow*, 2 *Lutw.* 1501, is stronger, which was an action of trespass, for taking three measures of barley at *Wallingford*, the defendant pleaded that *Wallingford* was an antient borough and corporation, and had a market and toll of one pint of grain for every comb of grain sold there by any foreigner; that *John Ferrers* a foreigner bought five quarters of barley there to sell, and sold them to the plaintiff; and because it was not said that he sold them there, and no place was alledged where the sale was, judgment was given for the plaintiff for the default in the plea. So if a defendant plead a submission to an award, and does not alledge the place where the submission was made, it is bad. Resolved upon demurrer, *Cro. Eliz.* 66. and without difficulty judgment in this case was given for the plaintiff.

In a release pleaded, no place was alledged, and held a material omission on a general demurrer. Bull. N. P. 46. 5 Com. Dig. 30. 2 *Lutw.* 1142. 4 *Bac. Abr.* 135. Hob. 233. Vide *infra* p. 142.

Where a submission is pleaded, and no place shewn, it is bad.

Case 95.

Barker *vers.* Lamplugh. In C. B.

To an action upon promise, defendant pleads that after he had undertaken to pay, one A. B. promised to pay the money due to the plaintiff, and held a bad plea because the promise was not in writing.

(a) *Vide supra* p. 141.

THIS was an action of *Assumpsit* upon several promises, defendant pleads, that after the taking upon himself the payment of the money, one *Theopla Judd* took upon himself to pay it to the plaintiff for the defendant; which promise the said plaintiff accepted, and intirely discharged and released the defendant. Plaintiff demurred, for that the plea in the whole or many parts of it was bad.

(a) First, no place was alledged where the promise was made, as above.

Secondly, the promise of a stranger cannot be pleaded in bar of the promise of the defendant; if it should be intended as one agreement, it is not good without satisfaction. (b) 9 Co. 79. b. *Peitoe's* case, &c. and one promise cannot be a satisfaction for another; a small sum is not a satisfaction for a great one on the same day. Co. Litt. 212. b. 5 Co. 117. a. *Pin-nel's* case.

(b) Cro. Elis. 193.
2 Term Rep. 25.
1 Com. Dig. 97.
1 Ld. Raym. 122.
2 Lutw. 1538.
S. C.
1 Bac. Abr. 25.
Raym. 203. 2 Keb. 690. S. C. 1 Mod. 69. Supra p. 10.

Also here the promise is not said to be by writing; and by the Statute (c) 29 Car. 2. no action shall be brought to charge any person for the debt, &c. of another, unless some note of it be in writing; and without difficulty judgment was given for the plaintiff. (1)

T. Jones, 158.
Raym. 450. S. C.
Bull. Ni. Pri.
edit. 1790.
p. 280.
Cowp. 227.
2 Ld. Raym. 1085.
2 Will. 94.
1 H. Bl. Rep. 120. 1 Com. Dig. 99. 1 Bac. Abr. 24. (c) Stat. 29 Car. 2. c. 3. Sect. 4.

(1) The present case falls within the following rule laid down by *Buller* Justice: "The general line now taken is, that, if the person for whose use the goods are furnished is liable at all, any

other promise by a third person to pay that debt must be in writing, otherwise it is void by the Statute of Frauds." 2 Term. Rep. 81.

Poulton, Attorn', &c. *vers.* Anne Goddard, Case 96.
Executrix of Thomas Goddard. In C. B.

IN an action upon the case for money due to the plaintiff as attorney, for the business of the testator; the defendant pleads *Plene administravit ante exhibitionem billæ ipsius* the plaintiff. The plaintiff replies, that the defendant had done waste; and upon demurrer it was allowed, that the replication was bad; but then the plaintiff took exception to the plea, because that * the plaintiff sued by writ of attachment of privilege, and the defendant says, before the exhibition of the bill of the plaintiff she had fully administered, where it ought to have been before the issuing out of the writ of attachment of the plaintiff; and therefore in the case *Lutw. 633. Roysson, executor of Roysson, vers. Barton*, in debt upon bond to the testator, the defendant pleads a composition by two thirds of the creditors in number and value, according to the Statute (a) 8 W. 3. and alledged that the composition was made before the exhibiting of the bill of the plaintiff, where the suit was in C. B. by original writ; and therefore the plea ought to have been, before the suing out of the original writ; and for this cause judgment was given for the plaintiff; and it makes no difference that here the suit be by an attorney who does not sue by an original writ; for the suit by writ of attachment is in the nature of an original; for as against other persons the original is by summons in debt, and by attachment only in trespass and other actions which are *vi & armis*, so the attornies and other ministers of C. B. have privilege to sue at all times by attachment. (b) It is true, that it is usually said, that attornies, &c. should sue by bill; (1) and when an attorney of C. B. pleads his privilege, he says it is the custom that no attorney is compellable to answer any one upon original writ, but by bill only. *Lut. 195. b. (c) and 4 Inst. 99.*

Plea, that the defendant fully administered *ante exhibitionem billæ ipsius* the plaintiff, where it ought to have been *ante impetrationem brev' de attachmente*, held b. d.
2 Lutw. 1638.
Nell. Lutw. 522.
5 Com. Dig. 204.
[* 143]

(a) Stat. 8 & 9 W. 3. c. 18.

(b) If an attorney sues by original he waives his privilege.
1 Rich. Pr. K. B. 82. 409.
2 Crompt. Pr. 113.
Barnes 479.

1 Rich. Pr. C. P. 61. Imp. Pr. C. P. 511. Imp. Pr. B. R. 417. (c) Skinn. 549. S. C. 3 Lev. 398. S. C.

(1) "For the privilege of attornies is in suits by bill," see 1 Rich. Pr. K. B. 409.

POULTON v.
GODDARD.

It is said that the Court of Common Pleas can hold plea by bill against the officers of the court, and other persons privileged; and I allow, if the suit had been against an attorney, the plea had been well; for he may sue by an original bill, as is cited in 1 *Lut.* 228. and so if in *B. R.* the suit commenced by bill of *Middlesex*; for a *Latitat* always supposes a bill of *Middlesex*, that is in the place of an original there; for all persons there sued by bill are supposed to have privileges of the Court, being in the custody of the marshal, or present in the court, as attorneys or officers there: so in a suit against an attorney of the Common Pleas, who is supposed to be present in court, the suit commences by bill, and the entry is as in *B. R.* That the plaintiff brought ——— or, that the plaintiff exhibited his bill against the defendant. 1 *Bro. Ent.* 33. But in a suit by an attorney, he may sue by writ of attachment of privilege, that is the first process for him; and when the defendant is brought into court by this writ, he declares against him in like manner as other persons declare upon an original writ; as appears by the precedent *Lut.* 343. 2 *Bro. Ent.* 8. and if a man declares in the Common Pleas *per Queritur*, and not upon an original writ, original bill, or writ of attachment of privilege, it is error; as was ruled *Lut.* 227, 228. *Dimock* vers. *Witherell*, an attorney of this court; and judgment was there against the plaintiff for this cause only.

[144]
Gillb. H. & C. P. 3.

D E

Termino Pasch.

5 Annæ. In C. B.

Stonehouse *vers.* Ilford.

Case 97.

THIS was an action of debt for Rent incurred in the life-time of the testator against the defendant, executor of *A.* upon a lease made by parol to *A.* for one year, and so from year to year, as long as both parties should please; the defendant pleads, that the testator was in debt to him upon two several bonds, the one for 200 *l.* the other for 40 *l.* and that he had not assets, only 20 *l.* which he retained towards satisfaction of his 240 *l.* aforesaid; and upon this there was a demurrer. And now it was argued by Serjeant *Chebbire*, that the plea did not avail. First, because that debt for rent which favours of the realty is of an higher nature than debt upon bond; and therefore retainer for debt upon bond cannot be pleaded to debt for rent; it was agreeable to the case between *Godfrey and Newport*, 2 *Vent.* 184. (a) where it was resolved in the Common Pleas, and afterwards affirmed in error in *B. R.* that a man cannot plead debt upon bond to deny satisfying an action of debt for rent. Secondly, the defendant cannot plead a retainer for part of his debt, for he ought to plead a retainer for his whole debt, otherwise it does not avail; for he ought to have debt for the whole against the executor, or for the whole against the heir; but how can he have debt against the heir, if he retains for part as executor: also he ought to have pleaded, that he agreed to retain before the action commenced; for when a testator is in debt to his executor,

Executors may plead payment of rent to debt upon bond, & *contra.*
4 *Burn's Ec. L.* 306.
Vide *supra* p. 67. the case of *Gage vers. Allen*, and the authorities there referred to.

(a) 3 *Lev.* 267.
S. C.
4 *Mod.* 44. S. C.

STONEHOUSE
v. ILFORD.

cutor, and he agrees to retain for his own debt, this is administering for so much, but it is not administration till his assent to make a retainer; for then he might give it in evidence upon *Plene administravit*; and if the defendant pleaded, that the testator was indebted to him, without more this would be bad; but for that reason such plea should be insufficient, if the law would imply an administration for so much as the testator was indebted to him, without his assent to make a retainer for so much for his satisfaction; and therefore it was resolved by all the Justices, between *Burditt and Pix*, 2 *Brownl.* 51. where the defendant pleaded a retainer for his own debt, that the plea would not avail; because that he did not shew, that he had made election before the action commenced to retain the goods for the satisfaction of his own debt; which seemeth, as he said, an express resolution in point. But by the whole Court it was resolved, that the plea was good, for debt for rent and upon specialty are in equal degree; and so it was resolved between *Aiton and Gage*, (a) *Pasch.* 9 *Will.* 3. and there it was also resolved, as Serjeant *Girdler* who argued for the defendant said, that the retainer may be for part of the debt towards satisfaction; and so it was here agreed by the Court without difficulty. And by the Court, it was not a necessary allegation, that he elected to make a retainer before the action commenced; for when a testator is indebted to his executor, retainer is administration for so much, and can be given in evidence upon *plene administravit*.

(a) *Supra* p. 67.

Andr. 337.
3 Burr. 1383.
2 Bl. Rep. 967.

Case 98.

Dummer vers. Birch. In C. B.

In covenant, a breach assigned ought to be positive and certain.
5 Com. Dig. 43.
2 Bac. Abr. 546.

THIS was an action of covenant. The plaintiff declares, that *inter alia* the defendant covenanted, that he would discharge all duties and charges due before the first day of *October* next; and the plaintiff assigned for breach, that the defendant did not pay or discharge all duties and charges for which these premises were chargeable. To which there was a demurrer; and argued, that the breach was neither within the words, nor pursuant to the intent of the covenant; for the intent was, that the defendant should discharge all arrears of rent which incurred before

before the first day of *October*, but here the breach is, that he did not discharge all charges for which the land was chargeable, which may be extended to many other charges; as appears in *Leon.* 92, 93. (a)

DUMMER v.
BIACH.

(a) 1 And. 162.
S.C. Ow. 6. S.C.
Goldf. 59. S.C.

Secondly, the breach is uncertain, (1) for no answer can be given to such particular charge; breach, *quod tenementum fuit ruinosum & in decasu in diversis partibus pro defectu reparati-*

Skinn. 344.
3 Lev. 319. S.C.
4 Mod. 188. S.C.
Holt 53. S. C.
Comb. 204. S.C.
Cuth. 271. S.C.
5 Com. Dig. 43.

onis, was holden bad for uncertainty. *Bend.* 62. pl. 110.

The plaintiff should shew how the party was disturbed or interrupted, to which a direct and positive answer might be given; and if this is not done the breach, is not well assigned. *Yelv.* 30. (b) *Cro. Eliz.* 914. S. C. So he should shew a breach directly within the words and intent of the covenant. 1 *Lev.* 301. (c)

Cro. Jac. 425.
infra p. 229.
5 Com. Dig. 42.

(b) *Noy* 50. S.C.

(c) 1 *Mod.* 66.
290. S.C.
2 *Saund.* 177.
S. C.
1 *Sid.* 466. S.C.
2 *Keb.* 684. 703. 709. 723. S. C.

Sed adjournatur.

(1) "If a breach of covenant is not certain and express, it is bad." 5 Com. Dig. 43.

Anonymous. In C. B.

Case 99.

THIS was a prohibition, upon a suggestion that the suit in the Spiritual Court was for tithes of heath and barren (1) ground improved, within seven years after the improvement, contrary to the statute; (a) and a rule was prayed for a consultation, because he had not proved his suggestion within six months, for the words of the Statute of 2 & 3 *Ed.* 6. c. 13. *Sec.* 14. are general. In case the suggestion for a

Where a suggestion for a prohibition is not proved in six months, the party shall have consultation without delay.
3 *Burn's E. L.* 392.
(a) *Stat.* 2 & 3 *Edw.* 6. c. 13. S. 5.

(1) It is laid down in the case of *Sberrington* *vers.* *Fleetwood*, *Cro. Eliz.* 475. *Moore* 430. 909. what lands shall be denominated barren, and consequently within the statute.

prohibition

- ANONYMOUS. prohibition be not proved in six months, &c. (2) the party shall
 In C. B. have a consultation without delay; and though there need no
 proof of the suggestion where the suit is for tithes contrary to
 common right, (a) or where the contract of the party is sug-
 gested; (b) yet in other cases it ought to be, as well as upon
 the suggestion of a *modus*. *Cro. Car.* 208. 1 *Jones* 231. S. C.
 and such suggestion was proved. *Dy.* 170. b. And to this
 the Court inclined.
-
- (2) Those months are calendar and are to be computed from the testa
 months. *Hob.* 179. *Litt. Rep.* 19. of the prohibition. 2 *Ld. Raym.* 1172,
 1 *Ld. Raym.* 1172. 2 *Salk.* 554. S. C. 2 *Salk.* 554. S. C.

D E

Term. Sanct. Trin.

5 Annæ. In C. B.

Anonymous.

Case 100.

IN debt upon bond for the payment of money due on the 9th of *February*, the defendant pleads, that he paid it on the 9th day of *January* preceding; and issue that he did not pay it on the said 9th day of *January*; and upon that a verdict for the plaintiff. And now it was moved to plead again; for notwithstanding this verdict the plaintiff may be paid after the 9th day of *January*, and before the 9th day of *February*, when the condition was that the money should be paid, and therefore the bond perhaps was not forfeited, and the plaintiff had no title of action: and it was argued by *Parker*, Queen's Serjeant, that it was an immaterial issue, notwithstanding it was aided by the statute. (a) And therefore it was ordered that they should plead again.

In an immaterial issue the defendant shall plead again, tho' after a verdict for the plaintiff.

1 *Ld. Raym.* 312.
Bull. Ni. Pri. edit. 1790. p. 162.
 1 *Bl. Rep.* 210.
 2 *Burr.* 944.
S. C.
 2 *Str.* 994.
Cun. Rep. 71.
 106. *S. C.*
 10 *Mod.* 147.
Cro. Jac. 434.
 1 *Burr.* 297.
 2 *Will.* 173.
 1 *Com. Dig.* 333.
 5 *Com. Dig.* 555.
 5 *Com. Dig.* 148.

(a) 32 Hen. 8. c. 30. 1 *Com. Dig.* 331.Harding *vers.* Harding. In C. B.

Case 101.

IN Dower, to the return of a writ of summons the tenant cast an essoin, that was adjourned *ad crast Martini*, and then the tenant made default, and upon that a grand *Cape* ought to issue, but a petit *Cape* was entered, and afterwards an *Alias* returned *a die Pasch.* in 5 *Sept.* and afterwards final

The judgment which is given upon a Petit *Cape* being awarded instead of a Grand *Cape*, will be set aside as irregular.

Fitz. N. B. edit. 3 *Crompt. Pr.* 346.

1755. p. 20. 3 *Com. Dig.* 136. 5 *Com. Dig.* 266. 2 *Enc. Abr.* 146. 2 *Crompt. Pr.* 346.

HARDING v.
HARDING.

[149]

judgment was entered, but the plea upon record in which judgment was entered was in *Trinity* Term; and it was moved that the judgment was irregular; first, because that a *Petit Cape* was awarded where a *Grand Cape* ought to have been awarded. Secondly, that no continuance was entered in *Easter* Term when the *Alias* was returnable, and *Trin.* Term in which judgment was entered; and upon this it was insisted that these misprisions might be amended, for they are only misprisions of the clerk; for when the *Effoins* Roll, which is the warrant for entering the *Effoin*, is inspected, it appears that the *Effoin* was to the return of a writ of summons before appearance, and then a *Grand Cape* and not a *Petit Cape* ought to issue; but here the entry is as if the *Effoin* was cast before appearance; mis-entry of *Effoin* in *Assumpsit* was amended 30 H. 6. 1. and the omission of entering an *Effoin* was amended by the common law 8 Co. 156. b. (a) So in *Formedon* where the tenant was admitted to prosecute by his *Prochein Amy*, and that was entered upon the remembrance-roll, but upon the philazer's roll the entry was, *quod demandant obtulit se quarto die per J. S. attornatum suum*; but this was allowed to be amended. *Lit.* 60.

(a) 1 Com. Dig.
314.

(b) Cro. Car. 86.
2 C.

Young's case. (b)

In this case the attorney for the demandant went to the philazer, and saw that the tenant had not appeared, and upon this prayed a *Grand Cape*, and this was a sufficient warrant to the philazer to make the entry; *acc' Yelv.* 155. which was an action of debt against three executors, and judgment by default, and the continuance was for all, where only one appeared, and it was directed to amend if it appeared that all appeared, otherwise not. So the non-entry of a cognizance upon record, if it be an antient roll. 35 H. 6. 24. b. So bail omitted to be entered shall be entered if it appears to be allowed. (c) So an attachment for a summons on a declaration, for it appears by original. 2 Cro. 108. *Cro. Car.* 91. (d) 1 Roll. 207. 814. 3 Bulst. 181. So *Habeas Corpus in placito Comp'*, for *placito Deb'*, 28 H. 6. 3. So *Osten' quare non fecerit.* 8 Co. 160. a. (e) And the entry of the *Petit Cape* for the *Grand Cape* is only one process

(c) 1 Com. Dig.
333.

(d) 1 Com. Dig.
319.

(e) Moore 5.
1 Com. Dig.
318.

process for another, which is within the Statute 32 H. 8. c. 30. which aids misconveying of process. (a) And where an omission of a continuance entered *Easter* and *Trinity* Term, this was the default of the clerk, 1 *Roll's Abr.* 200. pl. 27. 2 *Cro.* 528. and therefore it should be entered after judgment or error. (b) 1 *Roll.* 209. l. 5. *Hard.* 505. But by the Court the amendment was not allowed.

HARDING v.
HARDING.

(a) 1 Com. Dig.
316.

(b) 2 Mod. 316.
Bull. Ni. Pri.
323.

4 Bac. Abr. 140. 1 Com. Dig. 325.

Term. Sanct. Mich.

5 Annæ. In C. B.

Case 102.

(1) Anonymous.

An executor may traverse the devise of an executorship to another. Payment to an executor having a probate, if the probate is afterwards repealed, does not discharge the party against the legal executor.
3 T. R. 125.

THIS was an action on the case upon an *Indebitatus Assumpsit* by the plaintiff as executor of—for money due from the defendant to his testator. The defendant pleads, that *A. B.* was appointed executor to the testator and proved his will, and that the defendant afterwards paid him so much money, being part of the debt, in satisfaction of the whole, and that he on the receipt discharged the defendant. The plaintiff replied, that the probate granted to *A. B.* was afterwards, upon appeal, annulled by the sentence of the Ecclesiastical Court, and the will by which *A. B.* was made executor was adjudged to be forged, and the will by which the plaintiff is appointed executor allowed, *absque hoc*, that the testator made such a will by which *A. B.* was appointed executor; and upon this replication a demurrer.

In this case two points were argued by the Serjants at the bar.

First, if the traverse was good, for that the defendant having pleaded, that the testator made a will by which *A. B.*

(1) The whole of this case was denied to be law by *Buller* Justice, in 3 T. Rep. 133, where, upon it's being referred to, he says, "I think it carries it's own death wound on the face of

it." He examines minutely, and with much ability the two points included in it, and determines that they were both improperly decided.

was appointed executor, which was proved in the spiritual court, the probate there is conclusive and cannot be traversed; as was resolved 1 *Sid.* 359. 1 *Lev.* 235. in the case of *Noel and Wells*, (a) that if the probate of a will be given in evidence, that concludes the parties, that nothing can afterwards be given in evidence in contradiction to the probate, as that *there was no such will, or that the testator was not *compos*, but only matter consistent with it, as that the party had *bona notabilia*, that the probate was forged, &c.

ANONYMOUS.

A probate is conclusive evidence of a will. *Infra* p. 157. (a) 2 *Keb.* 337. 343. 641. 1 *Raym.* 262. 3 *T. Rep.* 127. 1 *Str.* 481. 703. *Cowp.* 322. *Raym.* 405. 406. 2. *Bac. Abr.* 398.

[*151]

Secondly, if the payment to an executor who was executor *de facto*, and had a probate of the will, was good to bind the rightful executor.

And judgment was given upon both points for the plaintiff, and *Trevor* C. J. gave the reasons of the judgment for the whole court; and as to the second point he said, that an executor derives all his authority from the testator himself, and that he of himself, as being executor without any thing more, has the power of disposing of the estate of the testator, of releasing a debt due to the testator, &c. True it is, before an action brought a probate is necessary, but that is only requisite to ascertain the court that the plaintiff is executor, and has a right to bring his action, not to give the plaintiff any title or interest to the estate of the testator. If the testator appoints no executor, or dies intestate, the administrator is appointed by the ordinary, and derives his authority from him; and therefore if administration is granted, all acts by him as long as the administration continues in force are good, and even though it be afterwards repealed. But there is a difference taken when an administration is repealed upon a citation, or upon an appeal. 6 *Co.* 18. *b.* *Packman's case.* (b) If it is upon an appeal, which suspends the administration, all acts after such suspension are void; if it is repealed upon a citation, all the acts of the administrator, till the repeal, are good, for by the citation the grant of the administration is not suspended, therefore if the administration be repealed, all acts done by an administrator, which a rightful administrator might

(b) *Cro. Eliz.* 459. *S. C.* *Moore* 396. *S. C.* 2 *Bac. Abr.* 411. 1 *Com. Dig.* 264. 3 *T. Rep.* 128. 2 *Lev.* 90. 182. 3 *Keb.* 206. *S. C.* *Raym.* 224. *S. C.* 1. *Str.* 509.

ANONYMOUS. have done, shall be allowed, for in them he acted in the place of the rightful administrator.

[152]

But it is otherwise in the case of an executor, for the probate of the will gives no authority at all to him, and therefore if he is not the rightful executor he has no authority at all, and it would be unreasonable that a person, who has no authority, should dispose of the interest of another; the rightful executor has not only a trust or authority to administer the goods of the testator, but also an interest annexed to the trust; and therefore the property of all the goods after administration is completely vested in him; and consequently the disposition of the goods of the testator, or release of his debts, is a disposition of the interest of the rightful executor, and therefore such disposition does not bind him; and so it was resolved 1 *Roll. Abr.* 919. (a) which case was never denied, (2) that I heard of. And this case is not like the case of an officer, who officiated without legal authority; as the deputy of the deputy of a steward, &c. for rightful acts done by him are good; (b) for he is an officer *de facto*, and in the immediate and open execution of his office, and the parties did not know whether he had authority or not.

(a) *Grew v. Weigbam.*
2 *Bac. Abr.* 412.

(b) *Supra* p. 84.

In this case of an executor some mischief may possibly happen, but it would be a more general inconvenience, if a tortious executor should be allowed to dispose of the right and interest of a rightful executor.

As to the traverse, I think it good; for whether a will, or no will, is a question triable by a jury; as is agreed in (c) 8 *Co.* 134. *Mer. Tresbam's case*, 9 *Co.* (d) *Abbot de Strata Marcella's case*; and the reason is, because the spiritual court had not the original jurisdiction of the probate of wills, and because as to trial the temporal courts have *quasi* a concurrent jurisdiction: and this is not like the cases 1 *Sid.* 359. and 1 *Lev.* 235. That the probate of a will concludes a person from saying

(c) 9 *Co.* 108. a.
1 *Brownl.* 51.
5. C.
(d) 9 *Co.* 31. a.

(2) The authority of this case in *Rolls* is destroyed, because the doctrine contained in it, is contradicted in 1 *Lev.* 158. 236. and 2 *Lev.* 90. Vide 3 *T. Rep.* 131.

that

ANONYMOUS.

that there was no such will; but notwithstanding this matter may be brought to trial; for the producing a will under a probate is only evidence that there was such a will; and though it is evidence of so strong a nature that no evidence shall be admitted against it, yet to plead that such a will was proved, is no reason why this matter should not be tried. Therefore judgment was given for the plaintiff.

Termino Pasch.

7 Annæ. In C. B.

Cafe 103.

Higginson *vers.* Sheif.

An officer is chargeable for an escape of a person, where the action arises out of the jurisdiction of the court by whose process he was taken.

1 Will. 255.
Carth. 148.

2 Com. Dig. 615.
3 Com. Dig. 183.
Iutra p. 278.

THIS was an action on the case for the escape of one *Wall* taken by the defendant, bailiff of the liberty of the temporal court of the Archbishop of *Canterbury*, by virtue of a precept issuing out of the said court, upon a plaint there exhibited in debt for the plaintiff against the said *Wall* for debt which was alledged to be within the jurisdiction of the said court; and the plaintiff declares, that the said *Wall*, was indebted to the said *Roger Higginson* in 200*l*. in the parish of *St. Dunstan*, within the jurisdiction of the court aforesaid; and being so indebted the plaintiff exhibited his plaint in the aforesaid court of record of the Archbishop, and that upon the plaint aforesaid a certain precept issued, directed to the bailiff of the liberty aforesaid, returnable the 17th of *April 5 Anna*, and was delivered to the said defendant on the 8th of *April 5 Anna*, to be executed in due form of law; by virtue of which precept the defendant afterwards, (*viz.*) on the said 8th day of *April*, in the parish of *St. Dunstan* aforesaid, arrested, and afterwards, (to wit) on the 17th of *April*, suffered him to go at large, *per quod* he lost his debt. The defendant, *Protestando* that the said *John Wall* was not indebted to the plaintiff within the jurisdiction aforesaid, nor that he did arrest the said *John Wall*, for plea says, that the cause of action upon which the plaint was exhibited did arise in *London*, and not within the jurisdiction aforesaid, of which the said defendant after-

wards, and before the return of the said precept, viz. on the 15th of April, in the parish of St. Dunstan aforesaid, had notice. To which the plaintiff demurred, and the defendant joined in demurrer.

HIGGINSON v.
SHEP.

And it was argued by Serjeant Hall for the plaintiff, and by me for the defendant; and I did insist, that the plaintiff by his demurrer here confesses that the cause of action arises out of the jurisdiction of the court, and that the defendant had notice of it before the return of the writ; and then tho' an action upon the case does not lie against the judge, officer or plaintiff, in an inferior court, when the cause of action arises out of the jurisdiction of the inferior court, as was resolved in *Lut.* 934. in the case of *Gwynne ver. Pool & al*, yet there it was agreed, that if the judge or officer had or might reasonably have cognizance that the cause of action arose out of the jurisdiction, and they afterwards proceeded, actions on the case would lie against them. By *Magna Charta*, *nullus capiatur, nullus imprisonetur nisi per legem terræ*; but by law none ought to be arrested on the plaint of another for debt, covenant or trespass, in inferior courts, where the cause of action arises out of the jurisdiction. By the Statute of *W. 1. c. 35.* Great men and their bailiffs shall not on the plaint of another attach any one passing through their jurisdiction, for contract, covenant or trespass, which does not arise in their power and jurisdiction, and for so doing shall pay double damages; which statute, as to the thing prohibited, was but an affirmation of the common law, tho' as to the remedy, it was introductive of a new law.

The Stat. of
Westm. 1.
3 Edw. 1. c. 35.
as to the thing
prohibited was
but an affirmation
of the common
law, tho' as to
the remedy, it
was introductive
of a new law.
2 Com. Dig. 614.

If then the arrest was illegal, the not detaining him shall not be penal.

It is true, that upon this statute the remedy shall be by prohibition before the suit commenced, or by prohibition after the suit commenced; and such prohibition after the suit commenced shall not be granted, but after plea to the jurif-

Two remedies
are provided by
this statute, and
both in the nature
of prohibition;
the one is
granted before

the commencement of the suit, the other after. 2 Inst. 230. 2 Com. Dig. 614. And prohibition after the suit commenced, shall not be granted but after plea to the jurisdiction tendered upon oath before imparlance. Raym. 189. 1 Vent. 38. 1 Sid. 464. S. C. 2 Keb. 673. S. C. 1 Mod. 67. S. C. 1 Vent. 181. 2 Keb. 853, 854. S. C. 1 Mod. 81. S. C. 1 Vent. 333. 2 Com. Dig. 614, 615. 2 Mod. 197. Cont.

HIGGINSON
v. SHERIFF.

[155]

dition tendered upon oath before imparlance; for if the defendant in his plea, or by imparlance, admits the jurisdiction of the Court, there is no reason that he afterwards, upon a bare suggestion, should oust the Court of the jurisdiction which he had admitted; so if he comes before plea, upon a bare surmise, to oust the inferior court of the jurisdiction, there is no reason that a Judge of a superior court should grant a prohibition upon the bare surmise of the defendant, that the cause of action arises out of the jurisdiction, as this is denied by the suggestion of the plaintiff in his declaration, that it was within the jurisdiction of the court; and therefore the cases, which say that a prohibition will not lie upon such a bare surmise of the defendant, do not prove that the officer might not by such bare information take notice of this, without being subject to an action for an escape.

If an action for false imprisonment was brought against an officer, for an arrest upon a precept out of an inferior court, when the cause of action arises out of its jurisdiction, this perhaps would not lie; and so it was resolved in the case between *Olliet and Beffy*, 2 *Jon.* 214. (a) But it does not follow that an action would lie for not arresting, or for an escape after the arrest; and so seems 2 *Jones* 214. where it is said, that it was agreed by the Court, that if a man is arrested tortiously, and afterwards delivered to the gaoler, and he afterwards is informed of the tortious taking (without any fraud in the case) he ought nevertheless to detain the prisoner delivered to him on the arrest, though the execution of it was illegal; for if such information be false, and he lets the prisoner go, he is liable to be sued for an escape; but this strongly imports, that if the information had been true, no action for an escape would lie; and if a man may justify the detainer, it does not follow that he shall be subject to an action for an escape, if he does not detain the person.

(a) Skinn. 49.
S. C.
Raym. 421.
467. S. C.
Lutw. 937.
2 Mod. 59.
196.
2 Com. Dig. 614.

If a new Sheriff has notice by parol of a prisoner's being in execution, he may detain him; but if he does not accept such notice without indenture of the old Sheriff, and permits the prisoner to go at large, he shall not be subject to an action for

for an escape. 3 Co. 72. a. (a) If a man be taken in execution after the writ of *Capias* awarded, and before it be delivered to the Sheriff, the Sheriff may detain him; but if he does not, he shall not be liable for the escape. 1 Roll. 908. But *per Cur'*, judgment must be given for the plaintiff; for *as the officer might justify the detainer, if he does not detain him he shall be liable for the escape, for he ought not to take upon himself to judge or examine this matter; and *per Tracy* the notice here is not well pleaded, for he ought to have said that he had notice before the escape, and it is not sufficient to say that he had notice before the return of the writ; and a case was cited by Serjeant *Richardson* to have been resolved in the King's Bench between *Lucking* and *Benning*, — *Anna*, where in an action for an escape against a Serjeant of the Counter, upon not guilty pleaded, it was given in evidence for the defendant, that the cause of action arose out of the jurisdiction of the court, and that the defendant had notice of it; and this matter being found specially, judgment was given for the plaintiff, for the officer shall not take upon himself to examine that matter, 1 Salk. 201. (b) and in the present case judgment was given for the plaintiff without further argument. (c) *Vide* 2 Mod. Rep. 30. where the contrary was resolved by three Judges. 3 Krb. 849. (1)

HIGGINSON v. SHEFF.

(a) Moore 682. S. C. Cro. Eliz. 365. S. C. Poph. 85. S. C. 2 Rolle Abr. 457. 4 Bac. Abr. 445.

Where an officer may justify the detainer, he shall be liable for the escape of a person.

[*156]

2 Com. Dig. 615.

(b) Holt 186.

S. C.

(c) 1 Freeman. 193. S. C.

(1) "Where the inferior jurisdiction is confined to place, viz. to all contracts arising within such a district, tho' the contract arise out of the district, yet the Court may award process, and the officer may execute it: unless it appears to him that it arose *extra jurisdictionem*; and that was the case. 1 Rolle 809, but

he is not bound to enquire, either whether there be a cause of action, or where it arose, and may proceed in his duty, unless the contrary appear to him." 1 Salk. 202. The case of *Squibb v. Holt*, 2 Mod. 29. above referred to, falls within this rule; and the case in 1 Roll. Abr. 909. was cited as an authority in point.

Landon *vers.* Beffingham. In C. B.

Case 104.

THIS was an action of debt by an administrator; the defendant pleaded in abatement, that *A.* made his will, which after administration granted was proved by the execu-

If a plea be to an action brought by one as administrator, that *A.* made an executor the defendant

ant ought to traverse that *A.* died intestate. Lutw. 889. 1 Salk. 297. 5 Mod. 145. S. C. Holt 397. S. C. 5 Com. Dig. 111. 202.

tor;

LONDON v.
BRISNIGHAM.

tor; upon which the plaintiff demurred. And the question was, if the plea was good without the traverse, *absque hoc*, that *A.* died intestate?

(a) 6 Co. 24. b.
Moore 551. S.C.
Cro. Eliz. 650.
S. C.

[157]

(b) 1 Brownl.
97. S. C.

(c) Supra p. 150.

(d) Supra p. 55.
and the cases
there cited.

Serjeant *Chefbire*: here the defendant has confessed and avoided the matter alledged, and then there is no occasion for the traverse, 6 Co. (a) *Helyar's* case, for the title upon which the plaintiff relies, is that he is administrator. But the plea that *A.* made his will, which was proved by the executor, destroys his title as administrator; if *A.* made a will he could not die intestate, if the will continues in force, as it appears to be, otherwise it could not be proved. If issue had been joined, that *A.* died intestate, and the plaintiff had produced his letters of administration, and the defendant had produced a will under probate, that had been conclusive evidence against the plaintiff that *A.* did not die intestate; and here if that matter had been traversed, nothing further could have been given in evidence to prove the traverse than what is now pleaded. I grant that it was resolved, in *Yelv.* (b) 115. that a traverse was necessary in this case, but the cases there cited are part *pro* and part *con'*. But it was resolved in this case by the Court without any difficulty, that the plaintiff ought to have traversed, *absque hoc*, that the said *A.* died intestate, for the plea is not a full confession and avoidance of the plaintiff's title without such a traverse; for as the plaintiff alleges himself to be administrator of *A.* and the defendant says that *A.* made his will, which was proved, this is not an absolute avoidance of the plaintiff's title, but only by argument or implication, and perhaps the probate was afterwards revoked or another will made, of which the plaintiff shall have the advantage upon the issue tried, and though the producing the will under probate (c) is conclusive evidence against the plaintiff who cannot prove that there was no such will, or that it was forged, yet it is but evidence; and there are many cases where what is sufficient evidence to prove a thing, is not sufficient to be pleaded, (d) as in *Trover* a demand and refusal is sufficient evidence of a conversion, but will not be sufficient to be pleaded.

James *vers.* Matthews. In C. B.

Case 105.

IN an action of Trespass, the defendant demanded *Oyer* of the original, and on the original there appeared a fault in the addition of the defendant, which the defendant pleaded in abatement; the plaintiff replied and shewed another original, and concluded with the traverse, *absque hoc*, that the action was founded on the other original; upon which the defendant demurred. First, for that the traverse was of a matter not alleged by the defendant's plea, for the original shewn upon the *Oyer* is no part of the defendant's plea, but the Court gives the *Oyer*. Secondly, for that the plaintiff ought to have concluded *et hoc parat' est verificare per recordum*; for as the plaintiff alleges an original which warrants his action, the defendant had nothing to say but that there was no such original, which being matter upon record ought to be tried by the record. Thirdly, that the replication concludes with a demand of damages. And for these reasons judgment was given for the defendant.

A plea in abatement shall not be avoided by another original,

[158]

Athol & al'. *vers.* —. In C. B.

Case 106.

THIS was an action of Replevin. The defendants plead, that the plaintiffs have such an estate in common, for which they were charged to contribute to find a horse in the militia, and that a warrant was granted by the Deputy Lieutenant of the county against the plaintiffs, to summon them at such a day to shew cause why they did not pay the sum charged upon them, but that the plaintiffs did not appear at the day; upon which a warrant was directed by the Deputy Lieutenant to the defendants, to levy the sum charged upon the plaintiffs by distress; by virtue of which the defendants justify themselves. The plaintiffs replied, that the militia did not exercise that year, and upon that the defendants demurred, and judgment was given for the defendants by the whole Court; for the defendants being officers have a warrant

A person is chargeable to the militia levy, though it was not exercised. Vide Stat. 26 Geo. 3. c. 107. 3 Burn's Just. 129.

ATHOL & AL'
v. ———.

warrant directed to them by the Deputy-Lieutenants who have cognisance of the matter, and it is nothing to the purpose that the militia was not exercised that year, for perhaps a sum was charged upon the plaintiffs to be paid annually, for when the militia is exercised, he who finds the horse will be at great expence, and those who are contributory pay a small sum annually for their proportion; then as the plaintiffs had a day upon the summons and did not appear, the warrant afterwards was for their default, and sufficient to justify the defendants.

D E

Term. Sanct. Trin.

7 Annæ. In C. B.

Edmund, Administrator (during the Minority of Anne his Wife) of Patience Maud, *vers.* Shaler.

Case 107.

IN debt upon bond for 400 *l.* against the defendant, the plaintiff as administrator aforesaid averred, that *Anne* his wife was under the age of twenty-one years. The defendant pleads in bar, that *Anne* was above the age of eighteen years. The plaintiff demurs. And it was urged by Serjeant *Pratt*, that administration during minority determines when the person for whose minority it was granted is seventeen years of age. But Serjeant *Chefbire* on the other side urged, that there was a difference between administration granted during the minority of an executor, and administration granted during the minority of one who is intitled to the administration; for in the first case the administration determines when the executor attains the age of seventeen years; for at that age the executor, by the Spiritual Law is able to take the executorship upon himself, of which our law takes notice; but in the case of an administration which is granted by the authority of the Statute 31 *Ed.* 3. c. 11. the person who has administration granted to him, ought to be capable by our law, by which the legal age is twenty-one, and consequently administration granted to another during his minority, does not determine till his age of twenty-one years; and this distinction was agreed to in the case of *Thomas (a)* and *Freeke*, 13 *W.* 3. *Rot.*

Administration during the minority of one intitled to administration shall not cease till his age of twenty-one years.

Supra p. 110. and the cases there cited.

4 Burn's Ec. L. 239.

5 Com Dig. 207.

1 Com. Dig. 262.

2 Bac. Abr. 382.

(a) *Supra* p. 116.

EDMUND W.
SEALER.

102. and in other cases there cited; the Court seemed at first to doubt; and I mentioned, that it was so resolved in the case of *Thomas and Freeke*, which case I argued; and the Court of King's Bench principally relied upon this reason, that administration was granted by virtue of the Statute 31 Ed. 3. c. 11. and consequently the age when an administrator ought to take the administration upon himself must be the full age allowed by our law.

The Court took time to consider, but afterwards being attended with the record of the case of *Thomas vers. Freeke*, and being informed by some of the Spiritual Court, that for forty years past the usage there was to grant administration only to persons of the age of twenty-one, and to grant administration till the person intitled to it attained his age of twenty-one, judgment was given for the plaintiff.

Note; the age of seventeen years allowed to be the age when an executor may take the executorship upon himself, is in conformity to the Spiritual Law, which allows an infant of seventeen years to be proctor or agent for another.

Case 108.

Abbot *vers.* Burton. In C. B.

A settlement by the heir on the part of the mother, to the use of himself in fee, shall be to the old use.

This case is much more fully reported in 11 Mod. 181. referred to below.
2 Salk. 590. S. C. 11 Mod. 181.
S. C. 3 Lev. 406.
Harg. Co. Litt. 23. a.
2 Will. 74.
2 Str. 1179.
2 Will. 2. 66.
3 C. 4 Br.
P. C. 486. S. C.
Harg. Co. Litt. 13. b. 2. 2.

IN an action of Ejectment upon a special verdict the case appeared to be this:

Stone seized of lands as heir on the part of his mother levies a fine and suffers a recovery, and declares the use to himself for life, and then to his wife for life, then to the first and other sons in tail, remainder to his own right heirs; and if the fee was in him as the old use, and should descend to the heirs of the part of his mother, or should descend to the heirs of the part of the father, was the question. And after argument it was now resolved by the whole Court, that it was the ancient use, and should descend to the heirs of the part of the mother; and Trevor C. J. gave the opinion of the Court.

D R

Termino Pasch.

8 Annæ. In C. B.

Thomas Harvey, Executor of R. Harvey, *vers.*
William Richardson & Ux'. Executrix of
R. Burgefs.

Case 109.

THIS was an action of debt upon a bond dated the 1st of
October, 1675, in which *Jof. Burgefs* and *Richard Burgefs*
the testator of the defendant, were bound to *Richard Harvey*
the testator of the plaintiff in the sum of 160 l. The defen-
dant demanded Oyer of the bond and condition, which recites
that *Samuel Leach*, by will dated the 11th of December, 1674,
gave to his two sons *Samuel* and *John* 30 l. a-piece, to be paid
at their respective ages of 21 years; and to his daughter *Mary*
20 l. to be paid at her age of 18 years or at the time of her
marriage; and if any of his children died before his legacy be-
came due, that the same should be divided amongst the sur-
vivors; and of such will made *Elizabeth* his wife executrix;
that a marriage was intended between the said *Elizabeth* and
Joseph Burgefs, whereby the personal estate of *Samuel Leach*
being estimated at 400 l. would come to his hands, if there-
fore the said *Joseph Burgefs*, his executors, administrators or
assigns, should perform the said will as to the said legacies of
30 l. a-piece given to *Samuel* and *John*, and as to the said le-
gacy of 20 l. given to the said *Mary* the children, then the
obligation should be void. And upon this the defendants
pleaded, that the said *Joseph Burgefs* did well and truly per-
form the said will as to the said legacies of 30 l. therein
given.

A plea of the
performance of
a will generally,
is bad.

HARVEY v.
RICHARDSON.

given to the said *Samuel* and *John*, and the said legacy of 20 *l.* given to the said *Mary*, according to the form and effect of the condition aforesaid; to which plea the plaintiff demurred, and shewed for cause, that the defendants did not shew how the said *Joseph Burgefs* performed the said will, nor whether he paid the said legacies or not, and that the said plea is uncertain and informal, upon which issue cannot be joined; and the defendants joined in demurrer.

Latch. 16.
Skinn. 303.
1 Show. 290.
S. C.
1 Ld. Raym.
594.
1 Lev. 303.
5 Com. Dig. 70.
83. 236. 257.
4 Bac. Abr. 93.

(a) Co. Litt.
303. b.

And now it was argued by Serjeant *Chebire* and myself for the plaintiff, and resolved by the Court, that the plea is bad, for it is too general, upon which the plaintiff could not join in issue, for it does not appear whether the legacies were paid, or whether any one was dead, whereby his legacy should be given to the survivors, nor when, or in what manner they were paid; and therefore the plea was bad upon the reasons of the cases (1) 2 *Cro.* 360. 2 *Bulst.* 266. S. C. *Lutw.* 420. And though the replication might have aided the plea, (a) yet that is not necessary; but the incertainty of the plea being shewn for cause of the demurrer, judgment must be given for the plaintiff. Serjeant *Hall* of counsel with the defendants would have taken a distinction where the obligation recites the certainty of the legacy, and where not, as in 2 *Cro.* 360. it does not appear how much was given for the legacy. *Sed non allocatur.*

(1) In this case Lord Coke said, that the defendant ought to plead in certainty the time and place, and manner of the performance of the condition, so as a certain issue may be taken, otherwise it is not good. 2 *Cro.* 360.

Hole & Ux' Executrix of A. *vers.* King.
In C. B.

Case 110.

IN an action of Trover, the plaintiff declared that the testator was possessed of the goods in question, and being so possessed made his will, and the plaintiff executrix, and died, after whose death the goods came to the hands and possession of the defendant by his finding them, who converted them to his own use. Not guilty was pleaded, and the plaintiff was nonsuited. And now it was moved by Serjeant *Pratt*, that the plaintiff ought not to pay costs, for he does not ground his action upon his own possession of the goods, and therefore though the conversion was in his time, * yet the plaintiff never had an actual possession of the goods, but only a possession in law, and therefore ought not to pay costs; and this seems to be within the reason of the case of *Hunt* and *Balloe* (a) now lately settled and resolved in this court, where an action of trover was brought by the plaintiff as executor, of goods of his testator, which the defendant had taken and converted to his own use, and it was there adjudged, that the plaintiff should not pay costs, and the reason seems to be, for that the executor never had the possession of the goods.

An executor shall pay costs where he brings an action as executor, which he might have brought in his own name.

Barnes 129.
3 Lev. 60. (1)
Ca. Pr. in C. B.
61. Caf. Temp.
Hardw. 193.
Say. Law of Costs, 99.
2 Com. Dig. 550.
4 Term Rep. 277.
(a) 2 Com. Dig. 549.

[*163]

But the Court resolved here, that the plaintiff should pay costs, for his testator died possessed, and then the property and possession was vested in his executor, and the trover and conversion by the defendant was in his time, and therefore he might have had an action in his own name without alledging himself executor. (2) But in the case of *Hunt* and *Balloe*, tho' the

(1) This case is denied to be law in Caf. Temp. Hard. 193.

(2) The rule in these cases is, that where it is necessary for a plaintiff, who is an executor, to name himself executor, and bring the action in the right of his testator, he is not liable to costs; but that where the cause of action arises in the time of the executor, he is

liable to costs; although he name himself-executor; because he might have brought the action in his own right. Caf. Temp. Hardw. 193. 1 Ld. Raym. 436. 6 Mod. 91. 181. 1 Salk. 207. S. C. 1 Str. 682. 2 Ld. Raym. 1413. S. C. 3 Burr. 1451; 2 Str. 1106. 4

Vol. I.

N

Term

HOLE v.
KING.

the trover and conversion was alledged in the time of the executor, yet there it appeared that the testator did not die in possession of the goods, and therefore there is a difference between the cases.

Term Rep. 280. It is holden in the case of *Atkins v. Spence*. Ca. Pr. in C. B. 61. that an executor who brings an action for the conversion of the goods of his testator after the death of the testator is liable to costs; because he might have brought the action in his own right. We find a similar decision and upon the same principle in 1 Vent. 92. 111. 2 Keb. 738. and Cas. temp. Hardw. 194. A contrary determina-

tion to the above is to be found in the case of *Cockerill v. Kynaston* in 4 Term Rep. 281. where Buller Justice says "that whether the conversion happened before or after the testator's death, if the goods when recovered, would be assets in the hands of the executrix, she must sue for them in her representative capacity, and then she is not liable to costs."

D E

Term. Sanct. Trin.

8 Annæ. In C. B.

Hopewell *vers.* Ackland.

Case 111.

IN an action of Ejectment upon a special verdict the case appeared to be this :

John Ackland, seised in fee of the lands in question made his will in writing to this effect :

Whereas I have given bond to leave my manor of *Buckley* to the daughter of my brother *James Ackland*, and the heirs of her body, if she live to attain the age of 21 years, but if she die before she attain that age, then it is to return to me again ; if therefore my said brother's daughter shall happen to die before she attain her age of 21 years, I give the said manor to my brother *Richard Ackland* and his heirs ; also I give to my brother *Richard Ackland* all my land, tenements, hereditaments whatsoever ; also I give to my brother *Richard Ackland* all my goods, chattels, monies, debts and whatsoever else I have in the world not before by me disposed of, he paying or securing to be paid all my debts and legacies ; and I make my said brother *Richard Ackland* my whole and sole executor of this my last will, and desire *B.* to be overseer thereof, and to see that my said executor and his executors pay the said debts and legacies ; and by the same will he devised some small annuities for life, and others to charities in fee, and died. The daughter of his elder brother attained her age of 21, and claimed not only the manor of *Buckley*, but also all

A devise with the following words *whatsoever else I have in the world*, will pass an estate in fee.

1 Sa'k. 239. S.C.

2 Vern. 687.

1 Eq. Abr. 177.

pl. 14. S. C.

3 Com. Dig. 26.

Infra p. 337.

HOPEWELL v.
ACKLAND.

the other lands of the testator after the death of *Richard Ackland*, who was now dead. The question was, whether by this will *Richard Ackland* had an estate in fee in those other lands, or only an estate for life? for it was agreed, that if he had but an estate for life, then the lessor of the plaintiff, who was heir at law of the testator, had a good title; but if he had an estate in fee, then the title was with the defendant, who was son and heir of *Richard Ackland* the devisee. This case was argued last term by Serjeant *Pratt* for the plaintiff, and by Serjeant *Parker* for the defendant, and now by Serjeant *Powis* for the plaintiff, and by Serjeant *Chebbire* for the defendant.

And it was insisted for the plaintiff, that *Richard Ackland* the devisee had but an estate for life; for the first clause which relates to the manor of *Buckley*, and the second clause which gives all his lands, tenements and hereditaments, and the third clause which disposes of his personal estate, are all distinct and independent clauses.

The first clause is particular, and recites, that whereas he had given bond to leave his manor of *Buckley* in such a manner, if therefore his brother's daughter died before her age of 21 years, then he gave his manor of *Buckley* to his brother *Richard* and his heirs; if it should be attempted to couple this clause with the subsequent clause, they must be taken together throughout, and then not only the manor of *Buckley* will be devised to his brother upon the preceding condition, viz. if the daughter dies under age, but also all the other lands will be devised upon the same condition; for it is plain and manifest that the manor of *Buckley* is devised upon that condition; then if this clause governs the subsequent devise of all his lands, tenements, and hereditaments, and limits them also to his brother and his heirs, then it must necessarily be that all his lands, tenements and hereditaments, are devised to him only in case the daughter dies under the age of 21 years; for the defendant shall not take only part of this clause and annex it to the subsequent clause, but must join the whole precedent clause with the subsequent one, or nothing; and if the whole is conjoined, the subsequent devise will

will be upon condition that the daughter die under the age of 21 years, as well as the former; which construction the defendant will hardly approve of, for the daughter did attain her age of 21 years, and then *Richard Ackland* will take nothing by the will. It was likewise observed that the testator in the first clause had taken notice of what words were necessary to create a fee, for there he devises the manor of *Buckley* to his brother and his heirs,

HOPWELL v.
ACKLAND.

It was insisted that the second clause is distinct from the first, and no way relates to it, nor is to be governed by it, for the second clause commences *de novo*. Also I give to my brother *Richard Ackland* all my lands, tenements and hereditaments, without adding the copulative *and*; the word *also* imports no more than *item*, and is of the same signification as *moreover*, and cannot be construed *in like manner*, as if the deviser had said, I give my manor of *B.* to my brother and his heirs, in like manner I give him all my lands, tenements and hereditaments whatsoever. But this subsequent clause is distinct and stands by itself, and there is a manifest difference where the first clause is compleat, and the second is attendant upon it, and must be construed with it, and cannot be construed by itself, there the second clause shall be governed by the first; as if a man devises *Blackacre* to *A.* and his heirs, and also *Whiteacre*, there the devisee shall have *Whiteacre* also in fee, for there are no words which can make the subsequent words a distinct and compleat clause; and therefore they must be governed by the words of the first clause; but where the second clause repeats the words, by which it may have a construction by itself, then it is a distinct and compleat clause and has no relation to the former; as where a man devises *Blackacre* to *A.* and his heirs, and also I devise *Whiteacre* to *A.*, there by the second clause *A.* has only an estate for life (*a*); for there the verb *I devise*, and also the name of the devisee is repeated, and therefore it is a distinct clause, and does not depend upon the precedent clause; and in this distinction the cases are agreed. *Mo.* 52, is stronger, for there a man by his will devises land to *Henry* his son; *item*, I give to my son *Henry* and his heirs; and there the doubt was, whe-

The word *also* imports no more than *item*, and it signifies the same as *moreover*, and cannot be construed to mean *in like manner*.
1 *Mo.* 100.

(a) 1 *Mod.* 102.

HOPEWELL v.
ACKLAND.

ther by the first clause *Henry* had a fee? And it was resolved by three Judges, that he had not, for that they were distinct clauses. But *Welfon* differed, because the latter clause had the word *heirs*, which he thought was applicable to the whole; but he agreed, that if the word *heirs* had been in the first clause, it would be otherwise; and therefore three Judges have agreed the law to be as we contend for in a case stronger than ours, and the whole Court agreed it to be so in a case the same as ours.

A devise to one indefinitely, without limiting any estate to him, gives him only an estate for life.

3 Com. Dig. 30.
2 Bac. Abr. 56.
La. ch. 40.
Pollexfen 541.

Dougl. 763.
Cowp. 238.
306. 659.

Intra p. 338.
A devise of all his estate in such hands passes a fee.

Cro. Car. 450.

1 Mod. 101.

1 Eq. Ca. Abr. 177. pl. 16.

4 Mod. 90.

1 T. Rep. 414.

2 T. Rep. 659.

1 Show. 358.

Styie 281. 294.

2 Lev. 91.

1 Ch. Ca. 262.

1 Saik. 237.

6 Mod. 106.

2 Atk. 38.

4 T. Rep. 93.

2 Ed. Reym.

1324. Dougl.

763. 2 H. 891.

Cowp. 306.

1 Eq. Abr. 176. pl. 4

Then if the second clause be considered by itself, I give all my lands, tenements and hereditaments to my brother *Richard Ackland*, that can pass only an estate for life; for it is the known rule, that a devise to one indefinitely, without limiting any estate to him, gives him only an estate for life. It is true if a man devises to another all (1) his *estate* in such lands, this passes the fee; so if he devises to him all his inheritances; but no one can think it is so intended by a devise of all his hereditaments, who considers the difference between the two words *hereditas* and *hereditamentum*; (2) for the word *hereditas* imports the estate which a man has in the land; *hereditamentum* the land itself which may be inherited; and therefore cannot be applied to the estate in the land, especially when it is coupled, as here, with other words of the same import; for the devisor gives to his brother all his lands and tenements; no one will say that those words import more than the things themselves; when therefore the devisor adds, *and all his heritaments whatsoever*, that denotes only such things as were not comprehended under those other words *lands and tenements*, but cannot be extended to the estate in those hereditaments, any more than the other words can be extended to the estate which the devisor had in the lands and tenements.

So a devise of all his inheritances. 1 Mod. 101. Hob. 2. Moore 873. pl. 1218. S. C. 1 Eq. Abr. 176. pl. 4 S. C.

Then if the third clause be considered: also I give to my brother *Richard Ackland* my goods, chattels, debts, monies,

(1) *Estate* imports the interest which a man has in lands. Co. Litt. (2) *Holt C. J.* says the word *Hereditament* implies a fee, *Holt*. 236. 345. d.

and whatsoever else I have in the world; the words, *whatsoever else I have in the world*, are very extensive; but if those words were singly by themselves, it would be hard by such general words to pass lands, which could not be devised by common law, but only by the statute, or by custom; and therefore the heir, who by the common law could not be disinherited by any devise, shall not now be disinherited, but where the words are plain and manifest for that purpose.

The rule in *Vaughan* is, that the heir at law shall not be disinherited by implication, except where the implication is necessary; it is not sufficient that it be possible or probable; and all that can be said in this case is, that it is possible, or at most that it is probable, that the testator here intended to give all his lands to the devisee. Where a man devised *all to his mother*, those words were as large and comprehensive as the words *all I have in the world*, yet it was resolved that nothing passed but the personal estate. *Raym.* 97. 1 *Sid.* 191. 1 *Lev.* 130. (a)

Cowp. 238. 302. 4 T. Rep. 91. *Infra*, p. 254. 353. 354. (a) 1 *Eq. Abr.* 207. pl. 1. 1 *Keb.* 719. S. C.

But whatever construction might be put upon those words, if they are by themselves, yet as they are here coupled with personal things, they shall not be extended to words of another nature.

There are many cases where words very general and indefinite shall be construed in conformity with and analogy to other words in the same case. 2 *Co.* 46. b.

HOPEWELL v.
ACKLAND.

[168]

Words disinheriting an heir must be plain, clear and not ambiguous. *Vaugh.* 262. *Pol.* 426. *Cowp.* 238. 3-2. 1 *Freem.* 149.

The Heir shall never be disinherited by an estate given by implication in a will, if such implication be only constructive and possible, but not necessary. *Vaugh.* 262. *Raym.* 453. 1 *Vent.* 223. T. *Jon.* 98. S. C. *Cro. Jac.* 75. 1 *Vent.* 376. *Poll.* 428. 3 *Will.* 418. 1 *Keb.* 719. S. C.

General and indefinite words shall be construed in conformity with and analogy to other words in the same case.

But on the other side it was insisted for the defendant, that the several clauses, each by itself, or at least taking them altogether, gave a fee to the defendant *Richard Ackland*; and in *Hil. Term 8 Annæ*, judgment was given by the whole court

HOPEWELL v.
ACKLAND.

for the defendant. And Trevor C. J. delivered the opinion of the whole court, and said, that the first clauses cannot be joined, for as the devisor gives to his brother *Richard Ackland*, and his heirs, his manor of *B. &c.* and afterwards adds, also I give to my brother *Richard Ackland* all my lands, tenements and hereditaments, the last is a distinct clause; the case in *Mo. 52.*—does not come up to this, for there the name of the devisee was not repeated in the second clause, and therefore it necessarily must be coupled with and construed with the first,

[169]

Then the second clause, by which he gives all his lands, tenements and hereditaments to his brother, gives him but an estate for life,

Infra p. 338.
Forr. 284.
3 P. Wms. 295.
S. C. 2 Eq.
Abr. 304. pl.
27. S. C. Prec.
Ch. 37. 2 Eq.
Abr. 514. pl. 1.
S. C. 2 Vern.
690. 1 Eq. Abr.
398. pl. 5. S. C.
2 Vent. 286.
1 Will. 333.
3 Will. 417. 3 Atk. 494.

But the last clause by which he devises to his brother all his goods, chattels and personal estate, and whatsoever else he has in the world, these last words, whatsoever else he hath in the world, import more than was said before, all his goods and chattels, (for those words contain all his personal estate) and therefore the additional words must go to something else.

The words
Rest and Resi-
due of his Estate
are sufficient to
give the devisee
not only the
lands not before
disposed of, but
also the estate
not disposed of in land devised to another. 2 Vent. 286. 1 Eq. Abr. 210. pl. 16. S. C. 3 Mod.
229. S. C. Carth. 50. S. C. Aleyn. 28. Moseley 242. 3 P. Wms. 63. 3 Atk. 492.
1 Will. 334. 3 Mod. 228. Comb. 93. S. C. 3 Vern. 461. 504. 621. 3 Com. Dig. 26.
Cwp. 301. 308.

If a man devises all the rest and residue of his estate, that is sufficient to give the devisee, not only his lands not before disposed of, but also the estate not disposed of, (*viz.*) the remainder and reversion of land devised to another for life, &c.

And the words
Whatever else he
hath in the
world, are tan-
tantamount.

And the words, whatever else he hath in the world, are tantamount, especially when the devise is, paying or securing to be paid his debts and legacies, and some of the legacies were in fee, and not properly payable out of the personal estate. Judgment was given for the defendant,

Fitzherbert *versus* Chancellor and Scholars of the
University of Oxon and Reeves, Clerk. Hil. Case 112.
7 Annæ. In C. B. Rot. 337.

THIS was a *Quare Impedit* by Jane Fitzherbert for the church of Swinnerton in Com' Stafford. The plaintiff declares, that Basil Fitzherbert was seised in fee of the manor of Swinnerton, with the advowson appendant, and by indentures dated the 7th and 8th of January 29 Car. 2, conveyed the same to the use of himself for life, and after to the plaintiff his wife for life; that Basil Fitzherbert afterwards presented John Plant, clerk * and died; that the church afterwards became void by the death of the said John Plant, by which the plaintiff had a right to present, but the defendants disturbed her. The Chancellor and scholars by their plea confess that Basil Fitzherbert was seised, conveyed, and died, and that the advowson became void, *ut supra*; but that by the statute (a) 23 Eliz. it was enacted, that every person who should forbear to repair to divine service contrary to the statute (b) 1 Eliz. and should be thereof convicted, should forfeit 20 l. of which the Justices of Assize, Oyer and Terminer and Gaol-Delivery, and Justices of the Peace at their Quarter-Sessions, should have cognizance; that by the statute (c) 28 Eliz. it was enacted, that for the more speedy conviction of such offenders, if upon indictment of such offenders proclamation should be made at the assizes, &c. that such offender should render himself before the next assizes, and if he should not appear at the next assizes, on the recording of such default the offender should be convicted. That by the statute (d) 3 Jac. it was enacted, that every Popish Recusant during his remaining convicted, from and after the end of that session of Parliament, should be disabled to present to any benefice, &c. and

Avoidances before conviction are as much within the stat. 3 Jac. 1. cap. 5. as avoidances after, and are equally within the remedies provided by that statute. Where the patron had presented one incumbent before conviction, and the university presented another after, the Bishop has his election to take one presentee or the other, and if the Bishop admits and institutes the presentee of the University, the patron cannot maintain a *Quare Impedit*, because there was no disturbance. But if the Bishop had instituted the presentee of the patron, *Quare* in that case whether a *Quare Impedit* would have been maintainable?

(a) St. 23 Eliz. c. 1. l. 5.
(b) St. 1 Eliz. c. 2. l. 14.
(c) St. 29 Eliz.

(d) St. 3 Jac. 1. c. 5. l. 18.

that

FITZGER-
BERT V.
KEEV. S.

(a) St. 1 W. &
M. c. 15. 1. 2.

(b) 30 Car. 2.
St. 2. c. 1. f. 3.

(c) St. 1 W. &
M. c. 26. f. 2.

[171]

that the University should present to every such benefice (1), and in the county of *Stafford, &c.* which should happen to be void during such time as the patron thereof should be and remain a Recufant convict. Tha by the statute (a) 1 W. & M. it was enacted, that any two or more Justices of the peace, who should suspect or be informed that any person was a Papist, should tender to such person the declaration in the statute (b) 30 Car. 2. and if he should refuse to repeat and subscribe such declaration, or to appear before the justices of the peace upon notice left at his most usual place of abode by any person authorised thereto by warrant under the hands and seals of such Justices of the peace, such person should thereafter be disabled, and become liable to the penalties and disabilities of a Popish Recufant convict, and the Justices should certify the name and abode of every person so refusing to the next Quarter-Sessions there to be recorded. That by the statute 1 W. & M. (c) it was enacted, that every person who should refuse to repeat and subscribe the said declaration, or to appear, &c. as in the last act is directed, whose name and abode should be thereon certified and recorded at the General Quarter Sessions, from and after the time of such record made should be disabled to make any presentation, &c. of any benefice, &c. as fully as if he had been a popish recufant convict, and that the University should present, &c. That on the 27th of *March*, 7 *Anna Ralph Bucknal & Richard Dyett, duo just' ad pacem, &c. informat' fuer' quod quer' suspect' fuit fore Papist', quodq; notic' inscript' per quend' R. A. autorizat' virt' warrant' sub manib' & sigill' dict' duor' just' reliet' fuit pro quer'; sed prad' quer' non comperuit*, and that the Justices certified the default to the Quarter Sessions, which was there recorded; *per quod & vigor' stat' pradiet' the Chancellor and Scholars to the Church per mort' pradiet' Job' Plant vacant' & adhuc vacant' existen', pradiet' quer' inhabil' virtute stat' præ-*

(1) The two clauses of the St. 3 Jac. 1. c. 5. viz. the 19th and 20th which give this benefit to the Universities respectively, are private clauses of which

the Judges cannot take notice, unless they are pleaded. 10 Co. 57. a. Hob. 227. 2 Gibs. Cod. 771. 3 Burn's E. L. 154.

FITZGER-
ARD
REEVES.

dict' ad presentand' remanen', presentaverunt the defendant Reeves, &c. The defendant Reeves pleaded the same plea. The plaintiff replied, that the church *vacavit per mort' prædict' Job' Plant 29 April 6 Anna*, and that the plaintiff 7 June prox' did present to the Bishop of Litchfield and Coventry *idoneam personam*, (*viz.*) *quend' Job' Walforne*, but the Bishop *admittere penitus neglexit & recusavit ac prædict' Cancell' & Scholar' & prædict' Reeves* (defendants) *eundem (quar') in præsentatione illâ injuste impediabant, de quo quidem impedimento postea & infra sex menses, &c. ac diu antequam prædict' certificatio in placito præd' mentionat' recordat' fuit, &c. (viz.) 23 Jul' 6 Anna, breve suum original', &c. impetravit, &c. & superinde narravit pro impedimento prædict' versus prædict' defend'.* To this replication the defendants demurred, and the plaintiff joined in demurrer. Serjeant Pratt insisted, that though the plaintiff had presented to this advowson, yet he being convict for recusancy before institution and induction, the University had title to present. For the Statute 1 W. & M. Sess. 1. cap. 8. which says, that a person suspected to be a Papist shall have notice, &c. and if he refuse to appear, &c. such default shall be recorded, and from and after the time of such record made shall be disabled to make presentment, relates to the Statute 3 Jac. 1. cap. 5. and shall be construed as if the Statute of 3 Jac. 1. c. 5. was expressly repeated, and the Statute 3 Jac. 1. c. 5. says, that every Popish recusant, during his remaining convict, from and after the end of that Sessions of Parliament shall be disabled to present to any benefice, &c. by which it appears, that every person convict for recusancy is disabled from presenting to any benefice, and there is no difference where the person is convicted before the avoidance happens, or after, for in both cases the law excludes his power of presenting, and intrusts the presentation with the University.

[172]

And admitting the University to be intitled to the presentation when the patron is convict for recusancy after the avoidance, then the case will not be altered because the plaintiff
had

FITZGER-
BERT V.
REVES,

had presented before conviction, and being disturbed in her presentation by the University, had brought her *Quare Impedit* for such disturbance before her conviction was recorded; for though the disturbance was before the title of the plaintiff was avoided, yet if the title of the plaintiff be avoided before the plaintiff recovers, she cannot recover, nor have damages for the disturbance; for the disturbance does not prejudice the title of the plaintiff, which is afterwards avoided by act of parliament, before the plaintiff could have recovered upon that title. The plaintiff shall not have damages for the disturbance till he has judgment; and no one shall have judgment for damages in *Quare Impedit* when he cannot have a writ to the

(a) *Infra* p. 177. Bishop. (a) *Co. Litt.* 362.

And notwithstanding the objections in this case, it appears that there was a regular conviction according to the directions of the Statutes. The first objection is, that it does not appear that the plaintiff was duly summoned, and refused to appear before the Justices, but only that notice, &c. was left at the mansion-house of the plaintiff, without saying it was at that time *tunc domus mansional'* of the plaintiff; but when notice is given at his mansion-house, that is not true, if it is not then his mansion-house, and *mansional' domus* imports that it was so then. The second objection is, that it does not appear that the persons before whom the conviction was were then Justices of the Peace; for it is only said, that information was given to such and such *Iust' Domini Regis ad pacem*, &c. without saying *tunc existen' Iust' ad pacem*, &c. but when the conviction is before Justices of the Peace, who act in their judicial capacity, it shall be intended that they have then a good authority, when it appears that they ever had an authority; for their authority shall not be presumed to be determined, but to have continuance till the contrary appears; and though there are many cases in indictments, where it must be alleged they were *tunc Iust'*; yet they do not extend to pleas in bar, which are sufficient to a common intent.

[173]

And it was argued by Serjeant *Weld*, and now by Serjeant *Lloyd* for the plaintiff, who insisted, that the conviction was

FITCHER-
HEAT &
REEVES.

not till after the avoidance happened; and therefore the avoidance was a chattel vested in the plaintiff; and she had executed her authority to the presentation before the conviction, and therefore the conviction cannot by relation defeat what was absolutely executed *quoad* the plaintiff before. The words of the statute are, That from and after the certificate of the default recorded, such person shall be adjudged a person disabled to make a presentation; but there the presentation was made before such certificate. To which Serjeant Pratt replied, that though a person could not be adjudged *inhabilis* till the certificate is recorded, the question is, whether when he is adjudged disabled, this does incapacitate him from presenting to avoidances which happened before the certificate recorded, as well as to avoidances after.

Afterwards in Michaelmas Term 8 Anne, this case was again argued by Sir Thomas Powis premier Serjeant for the plaintiff, and by Serjeant Cheshire for the defendant. And for the plaintiff it was insisted,

First, that by this plea there did not appear to be a legal conviction; and he did not wave the exceptions taken to the conviction by the counsel who argued before him, *viz.* that the plea shewed that information was given to R. Bucknall and R. Dyett, two Justices of the Peace, that the plaintiff was a Papist, that she had notice by A. B. by warrant of the said Justices, but does not say *adtunc Justic'*; and perhaps they were not then in commission, though they were at the time of the plea: also that it is said, notice was left *ad mansional' dom'* of the patron, without saying *adtunc dom' mansional'*.

[174]

Secondly, That it does not appear, that the plaintiff refused to appear before the Justices according to the summons; for the summons was to appear before the said two Justices & *al' Just'*; and it is alledged only, that she did not appear before the said two Justices; but perhaps she appeared before the others.

Thirdly, That it does not appear, that the plaintiff refused to appear, but only says *quod non comparuit*.

FITZGER-
BERT V.
RELIES.

Fourthly, that it does not appear, that the church was void at the time of the plea, but only that it was vacant by the death of *Plant*, and so remained to the time of the information to the Justices.

But the exceptions which he principally enforced were, that here it does not appear by the plea, that the Justices of the Peace were present at the time and place, when and where the plaintiff was summoned and appointed to appear before them; and when a man pleads a matter which shews a default in another, he ought to shew that all the particulars were observed which render that default inexcusable; as if a man pleads a default of a tender of rent, (a) it is not sufficient to say that the rent was demanded, and there was nobody ready to pay it; but he must alledge, that he was at the time and place of payment, and continued there a reasonable time, (*viz.*) till sun-set, ready to receive it.

(a) *Supra* p. 90.
117.

So in covenant for levying a fine, &c. it is not sufficient to say, that the party did not levy it, but he must shew that he on the other part took out a writ of covenant, &c. and did all that was to be done on his part; and it is here to be considered who ought to do the first act; for if he does not do all on his part, *it shall not turn to the disadvantage* of the defendant, that he did not do his part: and therefore, where the Justices of the Peace summon another to appear before them at a certain time and place, it ought to be alledged in the plea that the Justices were ready at the time and place assigned to tender the oaths and declaration required; and it is the stronger, that the Justices are not a Court which have a certain fixed time to assemble, but have an authority for this particular purpose only.

[175]

Secondly, The plea ought to shew that the plaintiff refused to appear before the Justices which granted the summons and before any other Justices, for this Statute 1 *W. & M.* refers as to the manner of conviction, to another act of the same Session, *cap.* 8. by which it appears that any Justice of the Peace has power to tender the oath and declaration; then when the two Justices summon the party before them or any other

other Justices, if the party appears before other Justices, it is as well as if she appeared before the two Justices who granted the summons.

FITZGER-
BERT v.
REEVES.

But if there appeared upon the plea to be a good conviction, yet it was too late; for it appears upon the record, and is now confessed by the demurrer, that the plaintiff at the time of the presentation, at the time of the disturbance, at the time of the action commenced was not convicted, nor summoned before the Justices, for the declaration in *Quare Impedit* was in *Mich. Term* — the information before the Justices, upon which the plaintiff was summoned to appear before them, was not till *March* following.

The case of the Chancellor of *Oxford* 10 Co. 53. b. is not parallel to the present case, and I do not observe it to be urged on the other side; for there the Statute 3 Jac. 1. cap. 5. which avoids grants of the next avoidance by the express words of the statute, has relation to the time of the session, and there is a reason for it; for if the grant of a benefice shall not be void till conviction, yet upon the summons in order to a conviction, the person so summoned would grant the advowson, which mischief cannot follow in the present case.

The patron here then at the time of the presentation was a person qualified to present, when the avoidance happened, she had an interest or right vested in her to present, and when she had presented a fit person, she had performed her office and had nothing farther to do. When an avoidance happens, that the interest in that is vested in the patron, is manifest, for if the patron, after the avoidance happens, dies, his executor or administrator shall present.

[176]

If a patron dies after his church becomes void, and before he hath presented, the avoidance is a chattel, and

goes to his executor. *Infra* p. 182. Co. Litt. 38. a. 1 Leon. 203. 4 Leon. 109. S. C. Watf. Cl. L. 76. Cro. Eliz. 141. 207. 3 Com. Dig. 195. 1 Burn's E. L. 11. 125.

If there be tenant *pur auter vie* of an advowson, which becomes void, and before presentation *cestuy que vie* dies, yet the tenant *pur auter vie* shall present.

FITZGER-
BERT W.
REEVES.

So if there be a guardian of an infant seized of an advowson, and there is an avoidance, and before presentation the infant comes of age, yet the guardian shall present.

But in our case not only an interest was vested in the patron before the conviction, but the patron had executed her power by an actual presentation of a person *qui fuit idonea persona*, and so it here appears upon record.

It was said that a presentation is not an execution of the authority of the patron, for he may revoke his presentation at pleasure, and for that were cited the cases in *Latch* 191: 253: 2 *Roll. Abr.* 353, 354. But this I deny.

It is true the King may revoke his presentation by his prerogative, *Fitz. Nat. Brev.* (a) — *Hob.* 214. But there being cases which take notice that it is the prerogative of the King to do this, imports that a common person cannot revoke his presentation, and so it is expressly said, *Fitz. Nat. Brev.*

(a) F. N. B. 8th
edit. p. 79. C.

The King in
right of his pre-
rogative may
revoke his pre-
sentation.

$\frac{2}{3}$ Com. Dig. 200. Carth. 37. Prec. Ch. 71.

A patron may
vary, but can-
not revoke his
presentation.
Infra p. 182.
Bac. Max. 92.
Cart. 37. *Dyer.*
292. a. *Prec.*
Cha. 71. *Hutt.*
67. 2 *Bl.* 1039.
7 *Bro. P. C.* 450.
6. C. 2 *Gibb.*
Cod. 795.
Watf. C. L. 224.
1 *Burn's E. L.*
135. 3 *Com.*
Dig. 200.

[*177]

The Civil Law takes notice that an ecclesiastical person cannot revoke his presentation, but a lay person may *variare presentationem* or *accumulando variare*, as some books say, but it is not said by the Civilians that a lay patron can revoke his presentation, but can vary it, that is can present another, or *accumulando variare*, that is present one and another *toties quoties*, and then the Bishop may take one *presentee or the other which he pleases; which shews that by their notion the lay patron cannot revoke, but only vary, which does not amount to a revocation of the first presentation, for then the Bishop could not take the first presentee. And this is all which *Roll* says.

He takes notice that by the *Scotch* law an ecclesiastical patron cannot vary his presentation, but a lay patron may *variare* or *accumulando variare*, and for that quotes *Skeen's Reg. Majest.* (1) — which is so; and then concludes, that by our law a

(1) I have examined the *Regiam Majestatem* with attention, but have been unable to discover the passage to which our Author refers.

lay patron cannot revoke, which is an express authority for us.

FITZGER-
BERT V.
REVER.

When the patron has presented *idoneam personam*, he has done all that belongs to him to do. *Goldb.* 103. says, that to an intire and complete plenarty are required the act of the patron, *viz.* to present a fit person, and when he has so done *funct' est officio*, the act of the Ordinary to give institution, and the act of the Incumbent to procure induction; and by this rule when the patron has presented, he has done all that lay in him to do.

And by such presentation an interest is vested in the person himself who is presented; it is true that *Quare Impedit* must be brought in the name of the patron and not the incumbent, but the incumbent may sue in the Spiritual Court to get admission by *duplex querela*, though perhaps the Temporal Courts would upon such a suit grant a prohibition.

But if the plaintiff here could not have a writ to the Bishop, yet the suit in *Quare Impedit* being well commenced, he may proceed for damages; and I deny the rule laid down on the other side, that the plaintiff shall not have damages in a *Quare Impedit*, where he cannot have a writ to the Bishop. The case *Co. Lit.* (a) only says, that the defendant cannot have damages, because he cannot have a writ to the Bishop; but the plaintiff may have damages though he cannot have a writ to the Bishop. If there be a *Quare Impedit* against the disturber and the incumbent, without naming the Bishop, and pending the writ six months pass, upon which the Bishop collates for the lapse (as he may do in such a case) though the plaintiff has judgment, he cannot have a writ to the Bishop to admit his clerk, for the church is full, but he shall have damages; and the Statute *West. 2.* (b) which gives costs in *Quare Impedit* provides expressly for such a case; for by that statute it is enacted, that the jury inquire of four points, if the church be full, and whose presentation, &c. if it be not full, the plaintiff shall have only half a year's value; if it be full, he shall have two years value, damages.

(a) *Supra* p. 172.

[178]

(b) *St. 13 Edw.*
1. c. 5. l. 3.

FITZGER-
BERT V.
KEEVES.

In the present case the avoidance happened, and the interest in it vested in the plaintiff before conviction; the plaintiff upon that presented, being then capable of presenting, and by her presentation had executed her power, and if the presentee had been then instituted and inducted, it would without question have been good, and therefore the disturbance was an injury to the plaintiff, and also to the presentee who had an interest by the presentation to him, and being *idonea persona* ought to have been admitted, and upon the refusal of him, a *Quare Impedit* was brought, and all this before the conviction for recufancy; and for these reasons he prayed judgment for the plaintiff.

If after a *Quare Impedit*, and judgment for the plaintiff, any thing happens, that the Bishop cannot admit the clerk, he may make a special return of that matter upon the writ directed to him.

And upon this record the plaintiff in the present case can make no other presentation, for by her replication she shews that she has presented such a person, and upon the refusal of him, this action appears to have been commenced, and therefore if the plaintiff recovers, the writ shall be confined to the same person.

In *Quare impedit* if the plaintiff be outlawed pending the writ that outlawry gives the King the title. *Infra* p. 182.

(a) 1 Leon. 63. S. C. Moore 269. pl. 421. S. C. 1 And. 179. S. C. Goldf. 44, 55, 103. S. C. *Infra* p. 180.

To this it was observed by Serjeant *Chefbire*, that in *Quare Impedit* if the plaintiff be outlawed pending the writ, that *outlawry gives the King the title, and the plaintiff cannot recover if that appears. (2) *Cro. Eliz.* 44. (a) *Sav.* 89. S. C.

[*179]

Which case was allowed to be so, but that it imported no more than that an avoidance (though only a chose in action) was forfeited to the King by his prerogative upon an outlawry; and therefore if a tenant to the King has an advowson which becomes void, and the tenant dies, his heir within age and in

(2) But on reversing the outlawry judgment, and the King's incumbent the plaintiff shall have execution of his shall be removed. *Cro. Eliz.* 45.

ward of the King, the King shall present by his prerogative, and not the executor of the tenant, as it would be if the heir was in ward to any common person, and therefore a case of prerogative ought not to be compared to the case of a common person.

FITZGER-
BERT V.
REEVES.

And Serjeant *Chefbire* on the other side insisted, that the exceptions to pleading the conviction could not avail, for it is expressly said that information was given to *R. Bucknel* and *R. Dyet*, *jussu ad pacem*, which notice was left at the mansion-house of the plaintiff, but the proposition is false, if they were not then Justices of the Peace, and if it was not then the mansion-house of the plaintiff.

Secondly, This case is not to be compared to pleading upon a forfeiture or breach of covenant, when the party, who would take advantage of such forfeiture or breach of covenant, must shew precisely that he has done every thing on his part, and therefore he agreed that the pleadings should be as were mentioned, where a man takes the advantage of non-payment of rent, or the not levying of a fine, &c. But the Justices here have a special authority by act of parliament, and when it is shewn that they have proceeded in all respects as the words of the act direct, it shall be intended that they have done all that those words import or require them to do.

Thirdly, he insisted, that by the act, after summons to the party to appear, &c. he ought to appear before the same Justices and no other.

As to the matter of law he insisted, that by the express words of the Statute 1 W. & M. (a) — that every person convicted for recusancy is disabled from presenting; and though in the second clause, which gives the presentation to the University, the words are *from and after such record made*, &c. yet it is manifest that in all cases where the patron is disabled from presenting for recusancy, the University has the presentation, and therefore such a construction ought to be made as may reconcile both clauses of the act, and answer the intent of it.

[180]
(a) St. 1 W. &
M. c. 26. s. 2.

FITZGER-
BERT v.
KEEVES.

The conviction, though after the *Quare Impedit* commenced; may be pleaded in bar; and he compared it to cases where matter subsequent, and which happens pending the writ, may be pleaded in abatement to the writ; and cited many cases to that purpose, and relied on the case in (a) *Cro. Eliz.* where in *Quare Impedit* outlawry of the plaintiff gives title to the King; he denied that the plaintiff could not revoke her presentation, or that it is confined to this particular presentee, if she recover, or that the presentee of the plaintiff had any right or interest vested in him by this presentation. *Adjournatur. Vide infra p. 181.*

(a) Suprap. 179.

Case 113.

Hammond *vers.* Hill.

When one person covenants with another that he shall have lands discharged of all rents, the covenantee ought to be discharged from a quit-rent.
Vin. Abr. Tit. Covenant. (Z.) pl. 25. p. 428.
Com. Dig. Tit. Covenant (E. 1.) vol. 2. p. 567.

THIS was an action of Debt upon a bond; where the condition was, that the defendant should keep harmless the plaintiff from all jointures, dowers, annuities, damages, claims and all other incumbrances, and should perform the covenant in the indenture dated the 2d of May, 1702, whereby the defendant conveyed to the plaintiff and his heirs a messuage and lands, called *Little Brinsby* in the county of *Suffex*, and by the same deed the defendant covenanted, that the plaintiff should have, use, possess and enjoy the premises aforesaid quietly and peaceably without any impediment from the defendant, his heirs or assigns, or any other person, and that clearly acquitted and exonerated of and from all former and other grants, &c. rents, rent-charges, arrears of rent, statutes &c. charges and incumbrances whatsoever. The plaintiff assigns for breach, that the tenements aforesaid were charged and chargeable with one annual rent, viz. a rent of 11 s. 6 d. to be paid to the Lord of the Manor of *W.* in the said county, of whom the said tenements then and before were and are held under the said rent and other services. The defendant by his rejoinder says, that the rent of 11 s. 6 d. aforesaid was payable to the Lord of that Manor as a quit-rent, incident to the tenure of those lands, and that the plaintiff was not molested, &c. for any arrears of that rent payable before the

[181]

the making of the indentures aforesaid. The plaintiff maintained his replication, and the defendant his rejoinder; and upon this there was a demurrer; and the question was, If this covenant was broken? And it was resolved by the whole Court without any difficulty, that it was. For the defendant had expressly covenanted with the plaintiff upon his purchase, that he should have the lands discharged of all rents, and therefore they ought to be discharged of this rent as well as of all others; for a quit-rent is a rent.

HAMMOND v.
HILL.

Judgment was given for the plaintiff.

Fitzherbert *versus* Chancellor and Scholars of the University of Oxford and Reeves. Cafe 114.
In C. B.

THIS case came now for judgment; and Trevor C. J. delivered the opinion of the Court, and he considered,

Vide supra p.
169.

First, If the statute 3 Jac. 1. cap. 5. extends to avoidances before conviction, or only to avoidances before conviction for recusancy.

Secondly, If it extends to avoidances after conviction in this case, where upon the avoidance a presentation was made, and for not admitting the clerk presented, *quare impedit* was brought before conviction.

Thirdly, If the conviction in this case was legal?

[182]

And the Court thought that the statute 3 Jac. 1. cap. 5. extends to all avoidances as well before as after conviction; for the words of the act are general, and the subsequent words, *when it shall become void, &c.* are words of enlargement and extend the gift of the avoidances of recusants to the University *toties quoties* the advowson becomes void, and

The Stat. 3 Jac.
1. c. 5. s. 18.
extends to all
avoidances as
well before as
after conviction.
2 Gibb. Cod.
771.
3 Burn's Ecc.
Law 154.

FITZGERBERT
v. REEVES.

words which were intended to enlarge shall never be construed to restrain the former words. Avoidances before conviction are also within the same mischief as the avoidances after, and it would be a hard construction, that general words shall not be extended to remedy all cases which are within equal mischief.

Supra p. 176.

(a) Supra p. 176.

(b) Supra p. 178.

Secondly, All avoidances being within the statute 3 Jac. 1. cap. 5, though the patron had presented, and upon refusal of his presentee had brought a *quare impedit* before conviction, yet in such case judgment shall be for the defendant; for after the presentation the right remains in the patron; and as before induction the King may revoke his presentation, so a common person, till his presentee is instituted, may at least vary his presentation, and upon such variation the Bishop may admit the first presentee or the last; this power then to vary the presentation remains in the patron till the church be full. But by this presentation, nor by the *quare impedit* is the church full, for *quare impedit* would not lie if the church was full by his own presentation. At the time then of the conviction this power or right of varying his presentation remained in the patron, and why shall it not be given to the University after the conviction? This power, if the patron dies, shall go to his executor or (a) administrator, if he be outlawed, shall be forfeited to the King, (b) Sav. 89. and for the same reason shall be transferred to the University; then when the Chancellor and Scholars of the University after the conviction present an incumbent to the Bishop, and the Patron before conviction had presented another, the Bishop has the election to take one presentee or the other, and therefore when the Bishop admits and institutes the presentee of the University, the patron shall not maintain a *quare impedit*, for that there was no disturbance; for it was in the Bishop's power to accept which he would: But if the Bishop had admitted the presentee of the Patron, and the University had brought a *quare impedit*, if that would be maintainable would be another consideration.

[183]

As to what was insisted, that the plaintiff here had a right to maintain *quare impedit* for damages; damages in *quare impedit* are but accessory, and follow the right of presentation; and therefore if the plaintiff had no right to present, she shall not have damages, for her right was not disturbed.

FITZHERBERT
v. REEVES.

Thirdly, The conviction here is legal; for when the party was summoned before the Justices of the peace to take the oaths, &c. the party ought to attend at the day; and here it is alledged, that she refused, and did not come before the Justices, &c. It is true, that the Justices ought to be present at the time appointed, and if they are not there, it would be a good excuse for the party; and upon a rejoinder *quod non recusavit*, if the fact appeared to be so, the issue would be with him, and the party if he pleased might plead specially, that he attended at the time, but the Justices were not present, &c. And in such a case the Justices are not obliged to do the first act, for there is no necessity that the Justices should be present if the party does not come; but it is sufficient if they leave one at the place to give them notice if the party comes; and the party himself is obliged to do the first act, (*viz.*) to attend at the time and place appointed. Therefore judgment for the defendant.

The justices ought to be present at the time appointed. It is sufficient however if they leave a person at the place to give them notice if the party comes, and the party himself is obliged to do the first act, *viz.* to attend at the time and place appointed.
2 Gibb. Cod. 772.
3 Burn's Ec. L. 156.

Shelf *versus* Bailly. In C. B.

Case 115.

THIS was an action of debt upon a bond; the condition recites, that a replevin was depending between the defendant and one *Webb*, who made consuance as bailiff to the plaintiff, for rent due on a demise from the said *Isaac Shelf* and *Margaret* his wife; and then goes on, that the plaintiff *Shelf* and defendant *Bailly* shall stand to the award of arbitrators, *ita quod* the award be made *de premissis* by such a day. The defendant demands oyer, and pleads no award made. The plaintiff shews the award, which recites, that *Bailly* had brought a replevin for taking his cattle against *Webb*; to which the defendant *Webb* had made consuance as

When one undertakes to submit to an award for another, he shall be bound by it.

[184]

SHELF v.
BAILY.

bailiff to *Isaac Shelf* and *Margaret* his wife, and sets forth, that *A.* being seised of the place where, in fee, devised the same to *Margaret* his wife, who demised the premises to *B.* for seven years, and afterwards married the plaintiff *Shelf*, and for rent arrears the avowant as bailiff to *Shelf* and his wife took the cattle levant and couchant in the place where *nomine distriction*; to which the plaintiff had replied, that *B.* and all those whose estate he hath in the place where, used to repair the fences between the place where, and *Baily's* close adjoining, & *pro defectu reparation* inde the said bailiff's cattle escaped to the place where; and issue was joined on the right to repair; and it was recited, that it appeared to the arbitrators, that *B.* and those whose estate he hath, ought not to repair the said fences, but a stranger ought to repair them, and then awards, *de & super præmissis* and all matters in difference between the said parties, and all proceedings in the said replevin should cease; that *Baily* should pay 7 *l.* 10 *s.* for the rent arrear to *Shelf*, and 10 *l.* for costs, and *Shelf* should give him a general release. Upon this there was a demurrer. And now it was argued that the award was void; for that *Webb* was a stranger to the submission, and that by this award the action between *Baily* and him was to cease; that so much was to be paid to *Shelf*, and he was to give a release, whereas *Webb* is intitled to costs if the plaintiff does not proceed; and the release of *Shelf* does not discharge the plaintiff *Webb*, being a stranger to the submission, and the award being void as to him.

To which it was answered, that *Shelf* here was the party concerned in interest, and a person may submit to an award for another.

If a person submits to an award on the behalf of a stranger, his bond shall be forfeit, if the stranger does not do, what the award requires him to do.

And the Court inclined, that if a person submits to an award on the part and behalf of a stranger, that his bond shall be forfeit if the stranger does not do what the award

1 Bac. Abr. 139.

requires

requires him to do ; but here it does not appear that *Shelf* undertook for *Webb*, or submitted on the part or behalf of him. (1)

*SHELF v.
BAILY.*

(1) Mr. *Kyd* in his treatise on the Law of Awards says, that "as *Shelf* in this case was the principal in the a-
" *vowry*, and *Webb* only an agent, " the award appears to be conclusive
" against *Webb*, and might have been
" set up as a defence to any claim of
" costs by him against *Baily*." p. 109.

Term. Sanct. Mich.

8 Annæ. In C. B.

Case 116. The Viscountess Bodmyn *versus* Sir Richard Child.

Tenant in dower
shall not have
execution of a
reversion after a
term.

THIS was a *Scire Facias* reciting, *cum Sara Vicecomitissa Dotissa de Bodmyn, quæ fuit uxor Roberti Roberts Ar', Vicecomit' de Bodmyn, Trin. 1 Jac. 2. recuperasset versus Abr' Vandembendy & Johan' Rotheram Sei'am de tertiâ parte sext' part' of several honours, manors, &c. in com' Essex, in Reman' post termin' 99 annor' incipien' 1 Maii 28 Car. 2. limited to Geo. Montague, Francis Butler, and Gul' Jessop, ut dotem suam, cumque præd' Abr' & Johan' sunt mortui, & Ric' Child, Bar' in sext' part' præd' unde dos præd' recup'at' fuit, ingressus est prout ex insinuacion', &c. præcipe Vicecomit' com' Essex quod per probos, &c. scire fac' præfat' Ric' Child & omnib' tenen' sext' part' præd' quod essent hic quinden' Pasche ostend', &c. quare præd' Vicecomitissa execution' & sei'am suam de tertia parte præd' (ita tamen quod occupator' & possessor' præd' termini annor' de & in eadem tertiâ parte adhuc ventur' a possession' suâ inde non amoveant') habere non debet juxta formam recuperation' præd'.*

Sir Richard Child appeared, and by his attorney demanded oyer of the record, & *ei conceditur in hæc verba, Essex, ff. Sara Vicecomitissa, &c.* by which it appeared, that she demanded dower against the defendants; who pleaded, that before the marriage of the demandant with her husband, Charles Earl of Warwick was seised of the said honours, manors, &c. in fee, and being so seised, by lease and release dated the 26th & 27th of August, 14 Car. 2. conveyed the said

BODMINE
CHILD.

said estate to the use of himself for life, then to *Charles Lord Rich*, his son and heir apparent, for life; then to trustees, till his first heir on the body of *Anne* his wife should attain the age of twenty-one; then to the first, second and other issue male of the said marriage in tail male successively; then to the first and other issue male of the said *Charles Lord Rich* by any other wife in tail; then to the heirs male of the said *Charles Lord Warwick*, and for default of such issue, to the said *George Mountague*, *Francis Butler* and *William Jessop*, for 99 years; then to *Hatton Rich* for 100 years if he so long lived; then to trustees to preserve contingent uses, then to the first and other sons of the said *Hatton Rich* in tail male; then to the heirs females of the body of *Charles Earl of Warwick* and *Charles Lord Rich* equally in tail; then as to one sixth part of the said estate, to the use of the said *Robert Roberts* and his heirs.

That the said *Charles Earl of Warwick*, *Charles Lord Rich*, and *Hatton Rich*, died without issue, viz. on the 1st of May 23 Car. 2. by which means the said *George Mountague*, *Francis Butler* and *William Jessop* devener' possessionat' of the said term for 99 years, the remainder as to the said sixth part to the said *Robert Roberts* and his heirs, and his estate in the said remainder. The defendants then aver, quod prædict' termin' 99 annorum nondum fuit finit' sive determinat' quodque ipsi nihil habent nec unquam habuer' in præd' sexta parte, &c. nisi in remanere post præd' term' 99 annor' inde; & hoc, &c.

Et præd' Vicecomitissa pet' judicium & sei' am de remanere ill' sibi adjudicari, &c. ideo consid' est quod præd' Vicecomitissa recuperet sei' am suam versus præfat' Abr' & Johan' Rotberam de tertia parte remanere præd'.

After oyer Sir Richard Child pet' judiciu' de præd' brevi de scire facias pro eo, quod præd' Sara per breve ill' pet' execution' & sei' am de præd' tertiâ parte, &c. ante determination' præd' termini annor' tam in recorde judicii quam in præd' brevi de scire facias mentionat', ac pro eo quod non apparet quod præd' termin' nullo modo determinat' exist', ac pro eo quod præd' Sara per breve præd'

BODMYN v.
CHILD.

præd' petit execution' & sei'am al' quam per iudiciu' præd' ei adjudicat' fuit.

Et præd' Comitissa, pro eo quod præd' Ric' Child tant' pet' iudiciu' de brevi de scire facias, &c. absque aliqua causa rationabili, &c. ac pro eo quod Ric' nihil in præcluson' execution' & sei'a ipsius Comitissa, &c. dic', ita quod eadem Comitissa remanet versus eum inde quodammodo' indefens', ipsa ut prius pet' execution, &c.

To this the tertenants demurred, and shewed for cause, *quod præsa' Comitissa per replication' suam pet' execution' & sei'am suam, &c. et non respondet ad placitum ipsius Ricardi in cassation' brevis præd' ut præfert' placitat'.*

A Scire Facias is a judicial writ, founded upon the judgment which it ought to pursue.

And it was argued that the plea in abatement was good, for the *Scire Facias* is a judicial writ, founded upon the judgment, and ought to pursue it, but the judgment is only that the demandant recover seisin of the third part of a remainder after a term for 99 years, but the *Scire Facias* prays an execution and seisin immediately, without shewing that the term for years is determined; nay it rather shews that the term is subsisting, for it says that it commenced on the 1st of *May 28 Car. 2.* and therefore it cannot be determined by the effluxion of time, and consequently shall be presumed to have a continuance if the contrary does not appear; and then during the continuance of the term the demandant cannot have seisin. And though the writ has a clause (*ita quod præfessor sine occupator termin' non amoveant'*) this will not aid it, for it is a contradiction, since the demandant cannot have seisin of the lands without ousting of the termor, for seisin imports the possession, *Co. Litt. 153. a.* and livery of seisin cannot be made when a term is in possession. If a man grant an estate to *A.* for years, remainder to *B.* for life, and *A.* enters before livery, it cannot be made afterwards, because the termor has the possession, and before *A.* entered, it could not be made to *B.* in remainder, for the possession did not belong to him, but it must be made to the termor himself. *Co. Lit. 48. b.* and 369. *b.* This shews that the sheriff upon a *hab. fac. sei'am* cannot deliver possession to the demandant without ousting the

Seisin of lands imports the possession of them.
4 Co. 10. a.

the termors, and therefore this clause is repugnant and contradictory.

BODMYN &
CHILD.

If there be a *Scire Facias* for the execution of a fine *sur grant* & *render* by him in remainder, after an estate for life or in tail, it must say, that the tenant for life is dead, or that the tenant in tail is dead without issue; so are all the precedents. *Off. Bre.* 268, 276. *Reg. Jud.* 12. b. 1 *Brownl. Ent.* 328.

A sci. fa. for the execution of a fine *sur grant* & *render* by him in remainder after an estate for life or in tail must say that the tenant for life or tenant in tail is dead without issue.

And if it was not made so, it might be pleaded in abatement. 40 *Edw.* 3. 16. b. 44 *Edw.* 3. 39. b.

But Serjeant *Pratt* answered, and the Court thought, that the demandant in dower should have judgment of the reversion and rent, and then she ought to have execution of that judgment, according to *Co. Lit.* 32. a. where it is said, that the sheriff shall give execution of a reversion by metes and bounds and of a third part of the rent, and execution shall not stay during the term. And so it was agreed 1 *Roll.* 678. L. 20. In *Cro. Eliz.* 564. *Wheatley* versus *Best*, (a), it was resolved accordingly; and there it is said that the execution shall be special, that the sheriff shall not oust the termor, and though it was urged that there is a distinction where rent is reserved upon the term and where not; for in the first case the sheriff might give possession of the rent in the same manner as where dower is demanded of a rent, of which the wife is dowable; but where no rent is reserved, as in the present case, execution shall be stayed during the term, as was agreed 1 *Roll.* 678. L. 22. for then the execution would be of no effect; yet there does not seem to be any difference, for the judgment ought to be executed in the one case as well as the other, and the termor can have no prejudice; and the Chief Justice thought that if the clause (*ita quod possessor*, &c.) had been omitted, the writ would have been good, for the clause is only an expression of that which would have been understood.

(a) Nov 65.
S. C.

It was then insisted that here was a discontinuance, for the plea *per' judicium de brevi*, and the demandant by her replication

[189]

BODMYN v.
CHILD.

Where a defendant pleaded in abatement, and the plaintiff by his replication concluded with praying judgment and damages, it was adjudged a discontinuance.

(a) 1 Salk. 177.

S. C.

Carth. 137. S. C.

Ld. Raym. 339.

2053.

Carth. 187. 433.

1 Show. 455.

2 Salk. 218. S. C.

Com. Dig. Tit. Discontinuance. (W. 2.) 5th vol. p. 180.

tion *pet' judicii' & seifam*, whereas she ought to have prayed that the tenant *respondeat ouster*, for if the plea was bad she might have demurred to it; if she does not demur, she ought to reply to the matter of the plea, and conclude with praying that the tenant might answer, not with praying seisin and execution; for the tenant might plead other matter in bar of the execution, as a release, &c. and therefore ought not to be precluded such matter; and therefore where a defendant pleaded in abatement, and the plaintiff by his replication concluded with praying judgment and damages, it was adjudged to be a discontinuance. *H. 1 W. & M. B. R. rot. 217. Between Bisse and Harcourt, 1 Show. 155. 3 Mod. 281. S. C. (a) Sed non allocatur*; for the plea in abatement is in nature of a demurrer; it being on matter appearing in the writ, not on any fact *dehors*, and when the tenant has made the first default, the demandant may well pray execution and seisin.

But it was adjourned, and afterwards judgment was given by the whole Court, that the plaintiff should not have execution upon this *Scire Facias*, there being no rent reserved upon the term, and therefore it would be vain for the plaintiff to have execution before the term was ended.

Judgment was given for the defendant. (1)

(1) The plaintiff afterwards exhibited her bill in Chancery praying that she might have the benefit of the trust, as to the third of the profits of this term; and the bill was dismissed. 1 Vern. 179, 356. Prec. Ch. 65. 1

Eq. Abr. 219. pl. 3. 2 Cha. Caf. 172. An appeal was afterwards brought, and on the 14th day of April, 1697, the decree was affirmed in the House of Peers. Show. C. P. 69. Prec. Ch. 66.

D E

Term. Sanct. Hill.

8 Annæ. In C. B.

Bird *versus* Line.

Case 117.

THIS was an action upon the case, in which the plaintiff declares, *quod prædict' defend' malitiose machinans & intendens ipsam Eliz' (plaintiff) minus rite pręgravare, opprimere, imprisonare & depauperare, ex malitia sua præhabuit* 16 die Junii anno Annæ Reg. 8. *levavit quandam querel' in Cur' Palatii apud Westm' versus ipsam Eliz', & querel' ill' in cur' prædict' prosecut' fuit sine aliqua causâ rationabili, donec prædict' quer' virtute cujusdam brevis de Cap' extra eandem cur' ad seip' ipsius def' 21 Junii prædict' capt' ac arrestat' fuit, & in prisonâ ejusdem Cur' pro defectu manucapt' detent' & imprisonat' fuit per spacium 30 dier', ipse prædict' def' bene sciens seipsum nullam legitim' causam action' versus quer' habere.* The defendant demurred generally.

An action on the case does not lie for a malicious suit *pendente lite*.

I insisted for the defendant, that this action does not lie; for though an action on the case lies against one who sues in an improper Court, where there is no jurisdiction of the cause, knowing it, 2 *Lut. (a)* 1571. and against one who sues in a proper Court, but proceeds there vexatiously; as by taking out a *fiery fac'* knowing that a *fiery fac'* had been executed before *Hob.* 205. so where one sues out irregular process, or pursues legal process for an illegal purpose; 3 *Lev.* 210. or where process is issued so clandestinely that the defendant had no notice of it till

An action lies for knowingly suing in a court where there is no jurisdiction of the cause. 2 *Will.* 302. 4 *Co.* 14. b. *Bull. Ni. Pri.* 12. And also for suing in a proper court but proceeding there vexatiously. 1 *Brownl.* 120. *Noy* 23. *Hob.* 266. *S. C.* *Bull. Ni. Pri.* 12.

(a) 1 *Vent.* 369. *Skin.* 131. *S. C.* 2 *Show.* 238. *S. C.*

BIRD & LINE.

An action will lie for such excessive damages being alleged that the defendant could not put in bail.

1 Mod. 4.
1 Lev. 275. S. C.
2 Keb. 546. S. C.
12 Mod. 257.
1 Ld. Raym. 380.
Bull. N. Pri. 12.
2 Will. 305.
1 Salk. 14.
Costs are given in those cases where actions are brought which will not lie.
1 Ld. Raym. 380.
(a) 1 Mod. 4. S. C.
2 Keb. 546. S. C.
1 Lev. 275. S. C.
(b) F. N. B. Edit. 1755.
p. 99. G.

he was outlawed; or where so great damages are alleged, that the defendant cannot put in bail; 1 *Sid.* 424 (a) yet where a man brings an action, and proceeds regularly in a course of justice, though the suit be without cause, yet an action on the case will not lie; for if the plaintiff does not recover, he shall pay costs. (1) And this was agreed by all the Judges of *England*, 2 R. 3. 9. b. No man shall be punished for suing out the King's writ, be it of right or wrong. *F. N. B.* 429. (b) And the same rule is agreed *Co. Lit.* 161. a. (c.) And the same thing was resolved by all the Judges. *Cro. Eliz.* 794. And it was so resolved by the whole Court in an action upon the case for suing for tithes in the Spiritual Court after payment to the party himself. *Cro. Eliz.* 836. 1 *Rel. Ab.* 102. S. C. *Noy* 37. S. C. And so it was resolved by the whole Court in an action upon the case for suing in the Spiritual Court for tithes of grofs (d) trees. 2 *Cro.* 133. 1 *Rel. Ab.* 34. And to this *Hale* agreed. *Hard.* 196.

(c) *Harg. Co. Litt.* 161. a. N. 4. (d) 1 *Show.* 254. 4 Mod. 13. S. C.

An action upon the case does not lie for a suit brought without cause.
Bull. N. Pri. 11.
12 Mod. 257.
1 Salk. 14.

And in these cases, where it is resolved, that an action upon the case lies where there is any collusion in the proceedings or abuse of the process, it is generally agreed, that if a suit be brought without any cause, where there is no other ingredient or circumstance in the case, an action upon the case does not lie for that. (2)

And I apprehend it cannot be contended, that an action upon the case will lie where the plaintiff declares, that the defendant commenced an action against him without any

(1) Lord Camden in the case of *Gosling v. Wilcock*, 2 Will. 305. says, "There are no cases in the old books of actions for suing where the plaintiff had no cause of action; but of late years where a man is maliciously held to bail where nothing is owing, or when he is maliciously arrested for a great deal more than is due, this action has been held to lie, because the costs in the cause are not a sufficient satisfaction for imprisoning a man unjustly, and putting him to the difficulty of getting bail for a larger sum than is due."

(2) The law upon this subject is laid down in the following manner in 1 Ld. Raym. 320. in the case of *Saville v. Roberts*, "If A. sues an action against B. for mere vexation, in some cases upon particular damage B. may have an action, but it is not enough to say that A. sued him false & maliciously, but he must shew the matter of the grievance specially, so that it may appear to the court to be manifestly vexatious."

reason-

reasonable cause, and upon which the defendant in the first cause was by the process of the Court arrested, and carried to prison for want of bail, without saying any more; for the same declaration might be upon every suit in *Weßminster-Hall*.

BIRD v.
LIND.

And therefore if the other words, *malitiose machinans ipsam opprimere, &c.* or *sciens seipsum legitim' causam action' non habere*, do not alter the case, the action here does not lie. But as to the first words, *malitiose machinans & ex malitia prehabita, &c.* which are added of course, they cannot render the action maintainable if the fact alledged in the declaration be not in its own nature, or has a tendency towards being illegal, covenous or oppressive. *Vide 1 Roll. Abr. 111.* So the words *sciens seipsum non habere legitim' causam action'* cannot render the action maintainable; and upon this I would offer this distinction: where the fact alledged in the declaration appears to have a tendency to vexation or oppression, there the allegation, that the defendant knew the fact, may make the action maintainable, which otherwise would not lie; for there the fact is provable and triable, and that notice of this was given to the party may be well proved; and therefore if there be an action in an inferior Court for a cause of action arising out of the jurisdiction, there the allegation, that the party was *sciens* of that, may make the action maintainable; for there the limits of the jurisdiction is matter of fact, and also the notice which the party had, that the action arose out of those limits, is a fact which may be well proved and tried; so perhaps if a declaration alledges, that the defendant brought his action for such a sum *sciens* that it was paid, or brought his action upon a bond *sciens* that it was forged, the action may be maintained; for the *sciens* is alledged of a fact which may be well proved. But where the *sciens* goes to a thing which lies solely in the mouth of the party, as in the present case, if the action is not otherwise maintainable, the *sciens* will not maintain it; for if the *sciens* renders the action maintainable, it ought to be traversable, and capable of proof and trial. But how shall it be proved that the party knew that he had no legal

[192]

An action may be maintained where the *sciens* is alledged of a fact which may be proved. But where the *sciens* goes to a thing which lies solely in the mouths of the party if the action is not otherwise maintainable, the *sciens* will not maintain it.

BIRD V.
LINA.

[193]

cause of action? if he was so informed, perhaps that information did not persuade him; if he himself declared so, perhaps he was afterwards convinced to the contrary: this is a thing secret in his own mouth only, which cannot be proved; then how shall it be tried? can a jury determine what shall be a legal cause of action? *ad questionem facti respondent jurator*, *ad questionem juris respondent iudices*. This is not like to an action upon the case in the nature of a conspiracy for an indictment *absque probabili causa*; for there the indictment is matter of fact, and the matter for which the party was indicted is a fact which shall be tried by a jury if he was guilty or not; and therefore the jury may well try if there was a probable cause for such an indictment or not. But if the action in this case should lie, the plaintiff does not shew that the action in the inferior Court was determined; perhaps it is not yet determined that judgment there shall be for the plaintiff.

Serjeant *Parker contra* argued, that the cases cited only prove, that an action upon the case does not lie for suing in a course of justice; but if a man, who knew that he had no cause of action, commences a suit in an inferior court, where bail cannot be taken, and declares that this was for vexation, and to detain him in prison without bail, when there never were any dealings between them, *as the case now is to be understood*, will not an action then lie? And this may be well proved: for it is admitted, that if an action be commenced for money which is paid, or on a bond which is known to be forged, an action on the case will lie; and why cannot it be proved that an action was commenced for vexation, and with an intent to imprison, as well as that it was commenced after the payment of the money, &c.? In the case 3 Lev. 210. it was agreed for the plaintiff, that an action lies for a vexatious suit; and *Levinz* only doubted, because it was not alledged *quod fuit sciens* that he had no cause of action; and *Hob.* 267. expressly says, if a man sue in a proper court, yet if his suit be without any ground of truth, and that certainly known to himself, the plaintiff may have his action on the case for it, though the suit in itself be legal.

And

And *Trevor* C. J. inclined to think that an action on the case would lie; for the declaration says, that *fuit absque rationabili causa*, as well as that the defendant *fuit sciens* that there was no cause of action. But *Blencoe* J. observed, that it was not alledged here, that the cause in the inferior Court was determined. To which the Chief Justice and the whole Court agreed, and for that reason were of opinion against the plaintiff, but did not give any express opinion that the other matter would be for the plaintiff; and therefore the plaintiff was permitted to discontinue his action.

BIRD v. LIND.
Gilb. 163.
10 Mod. 145.
209. S. C.
Bull. Nl. Pri. 130.
1 Str. 114.
Vin. Abr. Tit.
Actions. (S. c.)
pl. 23.

Dighton *vers.* Tomlinson. In C. B.

[194]
Case 118.

THIS was an action of ejectment upon the demise of ——— Upon not guilty pleaded, at the trial at York assizes, the jury found a special verdict to this effect: (*viz.*) That *John Tomlinson* being seised in fee, by his will dated the 19th of *February*, 1668. devises to his wife *Margaret* all the rest of his freehold lands and tenements in *York* for life, and then to be at her disposal; provided that she dispose of the same after her death to any of her children, &c. After the testator's death the wife having issue a son and a daughter married again, and she and her husband by lease and release conveyed the lands to the use of herself for life without impeachment of waste, after her death to her daughter in tail, and for want of such issue, to her son and his heirs, with a power of revocation; and if, &c.

A devise to one for life, and then to be at her disposal, provided she disposed of the same after her death to any of her children; was holden only an estate for life in the mother.
1 Salk. 239. S. C.
1 P. Wms. 149. S. C.
10 Mod. 31.
71. S. C.
2 Eq. Abr. 309.
pl. 13. S. C.
Powell on Pow.
9. 32. 55.

Serjeant *Pratt* argued for the plaintiff, who claimed under the daughter, and insisted,

First, That by this devise *Margaret* had a fee; and it is not material whether it was upon a trust, or upon condition; I agree, if a man devises, that *J. S.* shall dispose of his lands, nothing passes but a power, and no estate; but if lands are devised to one upon an intent or condition, which cannot be performed without an estate of inheritance in the devisee, there the devisee has a fee; as if there be a devise to any person to sell; here then, if the devisor had given

P 2

his

A devise of lands to one to sell, is a fee-simple.
C. Litt. 9. a.
113. a.
1 B. Wms. 151.

DIGHTON v.
TOMLINSON.

[195]

his lands to *Margaret* his wife to be at her disposal, without mentioning the words *for life*, she would have had a fee. The statute of wills says only, that a man may dispose at his will and pleasure; and there never was any doubt but that he might by this expression give a fee. If a man devise to another and his assigns, it will be a fee. A man devises for life, and after to be at the discretion of his father; and it was holden to be a fee. 1 *Leon.* 283. *Genner and Hardy.* A man devises to *Editb* his wife for life, and after for her disposal; it was holden that the wife had a fee; which is the same case as here; and the case *Dal.* 56. is stronger. It is true, if a man devise to *A.* for life, and after that he dispose to any particular person, there may be a doubt if this be not tantamount to a devise to such particular person; but here the power of disposition is general both as to person and estate.

(*) *Freem.* 149.
163. 176.

2 *Lev.* 104. S.C.

The case 1 *Mod. R.* 189. *Saltonstall* versus *Lith* (a) is nothing to our case; but as it is reported in *Carter* 232. makes for us.

If then the words (for life) had been omitted, the devise would have been in fee; but the addition of the words does not alter the case.

But if she had but an estate for life, with a power of disposing, she has well executed that power. The law does not require any precise conveyance for the execution of a power, a bare appointment is sufficient. 1 *Mod.* 189. *Lith* and *Saltonstall.* *Litt. Sect.* 169. Executors may sell, though they have not the estate. *Covenant to stand seized,* 1 *Lev. lease and release,* 1 *Lev.* 150.

But it may be objected, that here the lease and release must operate as a conveyance, and afterwards as an appointment; it may be so.

But it was objected, that the appointment ought to be by devise, and not to any person who would perhaps then not be *in esse*: But certainly such construction should be made as may be agreeable to the nature of the case; she could not make

make the disposition after her death; and if she did it in her life, why might she not do it by an act executed, as well as by will? It was said, that a will is revocable; but here she has added a clause of revocation, which answers all the purposes of a will.

DIGHTON v.
TOMLINSON.

Then tho' she has limited to herself an estate without impeachment of waste, that is not material; for it is no part of the execution of her power, but an addition to her own estate; and the addition is void if she had but an estate for life; as in the case 1 *Roll. Abr.* 313. where there is a licence to a copyholder to make a lease; if he leases pursuant to the licence and adds any other circumstance not warranted by the licence, the addition is void. If an executor assent to a legacy with condition, the assent is good, but the condition void.

[196]

Where an executor delivers a legacy upon condition, the condition is void.

Cro. Eliz. (a) So if a woman assign her dower with a condition, the assignment is good. Then the husband joining in the execution does not vitiate the execution of the power. 1 *Roll. Abr.* 369.

(a) A *Cro. Eliz.*
41. 462.
1 *Roll. Rep.*
140.

If one who has no estate in the land join in a lease with him who has the estate, this is the lease of him who has the estate, and is but the confirmation of the other. *Co. Lit.* 45. a.

It will be no objection, that she has not given a fee but only in tail, for the power to make a greater warrants a lesser estate. 1 *Rolls Abr.* 330.

The power of making a greater warrants a lesser estate. 1 *P. Wms.* 163.

Serjeant *Wynne* argued for the defendant, who claimed under the son and heir at law.

This case was afterwards argued by Serjeant *Chebbire* for the plaintiff, and Serjeant *Parker* for the defendant; and it was insisted for the defendant, first, that the wife by this devise had only an estate for life with a power to dispose; and secondly, that this power was not well executed.

Upon the first point the Court unanimously held that the wife had only an estate for life; but upon the second point

DIGHTON v.
TOMLINSON.

three of the Judges held the power well executed; so judgment was given for the plaintiff; which was afterwards affirmed upon a writ of error in the Queen's Bench. (1)

(1) *Parker* C. J. declared that "with regard to the other question (*viz*) the execution of the power, it is clearly our opinion, that this conveyance by way of lease and release is an effectual, though improper, execution of the power." 1 P. Wms. 171.

Case 119.

[197]

Where a will is well executed within the Statute of frauds, &c.

2 Eq. Abr. 761.

pl. 6. S. C.

Pow. on Dev.

78. 106.

4 Burn's Ec.

L. 116.

Peate *vers.* Ougly. In C. B.

IN an action of ejectment upon the demise of *Oliver St. John*, at a trial at *Guildhall* after term before Lord C. J. *Trevor*, the case upon evidence appeared to be as follows, *viz.* *Oliver* Earl of *Bolingbrooke* before the statute 29 *Car. 2.* *viz.* 1668-9, wrote his will with his own hand on a sheet of paper, and the writing went to the bottom of one side and half way on the backside, which will at the end of it had the name and seal of the Earl subscribed, and notice was taken in his own hand of some interlineations. At a very little distance at the backside of the same paper, a codicil was written which extended almost to the bottom of the same backside of the paper, and was dated 1679, which was after the statute 29 *Car. 2.* and had the name of the devisor subscribed and his seal affixed; in which codicil a legacy as to a house in *Ludgate-street, &c.* was revoked, and the same was thereby devised to Sir *Andrew St. John* for life, and after to his brothers successively, but notice was not taken of the names of his brothers in the codicil, but they were named in the will; at the top of the will was written (signed, sealed and published as my last will and testament, in the presence of, the same being written here for want of room below); this was likewise written by the testator's own hand, and then the names of the three witnesses were subscribed; two of those witnesses were dead, and the third was produced at the trial, who testified that he was servant to the testator *Oliver* Earl of *Bolingbrooke* four years, and about 27 or 28 years ago, he and the other two witnesses were called up in the night and sent for into the Earl's chamber,

ber, who produced a paper folded up, and desired him and the others to set their hands as witnesses to it, which they all three did in his presence, but they did not see any of the writing, nor did the Earl tell them it was his will, or say what it was, but he believes this to be the paper, because his name is there and the names of the other witnesses, and he never witnessed any other deed or paper for the Earl. And though the Earl did not set his name or seal to the will in their presence, yet he had often seen the Earl write, and believes the whole will and codicil to be of his hand writing. Upon this evidence, first, it was insisted for the defendant, that it does not here appear that the codicil was well executed according to the statute, for it is not proved that the codicil was written when the witnesses subscribed their names to the will.

PEATE v.
OUGLY.

[198]

Secondly, The execution of the will is not good within the statute 29 Car. 2. (a) (and therefore, if the codicil was written then, it is good for nothing) for it is not sufficient that the witnesses write their names in the presence of the testator without any thing more, but they must attest every thing, viz. the signing of the testator, or at least the publication of his will; but here the testator neither signed the will in their presence, nor declared it to be his last will before them.

(a) St. 29. Car.
2. c. 3. s. 5.

Thirdly, If the codicil was well executed within the statute, yet the devise to the brothers successively is void for the uncertainty which shall take first in the succession, as a grant or lease to *A. habendum* to him and two others successively is void, for the uncertainty which shall take.

A grant or lease to a *habendum* to him and two others successively is void for uncertainty.

On the other part it was insisted, that upon this evidence it is apparent that the codicil was written before the execution of the will, for otherwise there was no reason that the witnesses should write their names at the top of the first side of the will, and the words written by the testator's own hand, as the reason of it, had been false if the codicil had not then been upon that paper, for there would have been sufficient room below the will for the witnesses to attest it. The witness also

PEATE v.
OUGLY.

says that the execution was about 27 or 28 years ago, which time is subsequent to the codicil.

It is not necessary that the witnesses to a will should see the testator sign it. 1 P. Wms. 741. 2 P. Wms. 509. 3 P. Wms. 254. Prec. Ch. 184. Doug. 244. 1 Burr. 554. 2 Ves. 454. 2 Atk. 176. 2 Ch. Caf. 109.

[*199]

The execution is sufficient within the statute, for there is no necessity that the witnesses see the testator write his name, and if he writes these words, *signed, sealed and published* as his will, and prays the witnesses to subscribe their names to that, it will be a sufficient publication of his will,* though the witnesses do not hear him declare it to be his will. And Sir *John Hollis* mentioned a case determined by Lord Chancellor *Shaftsbury* before the statute 29 Car. 2. where a man wrote his will with his own hand, and also these words, *signed and published in the presence of*, and no witnesses had subscribed it, it was holden to be a sufficient publication.

And *Trevor C. J.* inclined that here was sufficient evidence to find the codicil well executed, and the jury found it accordingly.

But as to the matter of law, the C. J. permitted it to be found specially, and therefore the jury brought in their verdict as to all except a messuage in *Ludgate street*, not guilty; and as to that, that *Oliver Earl of Bolingbrooke* was seised of that in fee, and being so seised by his codicil 1679 devised it *prout, &c.* That Sir *Andrew St. John*, had two brothers *Rowland* and *Oliver* the lessor of the plaintiff; that *Rowland* died in the life of Sir *Andrew*, and Sir *Andrew* died about two years ago. And after his death *Oliver* entered and demised to the plaintiff. That the defendant claimed by purchase for a valuable consideration from *William* now Earl of *Bolingbrooke*, who was heir at law to the testator.

Dr. Pelling *vers.* Whiston, before the Delegates. Case 120.

DR. Pelling being minded to exhibit articles of heresy against Mr. *Whiston*, who dwelt within the exempt and peculiar jurisdiction of the Dean and Chapter of *St. Paul's*, Dr. *Harwood* by letters of request on the 18th of *November*, 1712, requests Dr. *Bettesworth*, Official of the Arches, to call the said Mr. *Whiston* before him, and hear and determine the said cause.

In a libel for heresy, the refusal of a citation by the Dean of the Arches, was holden a good cause of appeal to the delegates. 2 Gibf. Cod. 1007. 1 Burn's Ec. L. 394.

Dr. *Bettesworth* by letter dated the 19th of *December* 1712, recommended it to him to proceed in this as in other causes of Ecclesiastical Cognisance, there being no suggestion of any reason why the cause should not be brought before the proper ordinary.

[200]

On the 14th of *February* 1712, Dr. *Harwood* by new letters of request (for it may be doubtful whether he as Commissary of the peculiar jurisdiction can proceed to a final hearing, or inflict proper punishment, &c. appeals his request to Dr. *Bettesworth*, Official, &c. to call Mr. *Whiston* before him, and determine the said cause.

Before this, *viz.* on the 26th of *January*, Dr. Pelling prays a citation from the Court of Arches against Mr. *Whiston* for heresy; Dr. *Bettesworth* takes time to consider of this prayer till the next Court.

At the next Court, *viz.* on the 4th of *February*, Dr. *Bettesworth* orders his answer to the letter of request of Dr. *Harwood* to be sent to him.

At the Court holden on the 16th of *February* Dr. Pelling prays again a citation, and counsel is heard thereon on the 25th of *February*, when Dr. *Bettesworth* decrees, that letters of request from Dr. *Harwood* lie not before him, because in a case of heresy the Bishop of the diocese hath jurisdiction in places

PELLING v.
WHISTON.

places otherwise exempt within his diocese, and notwithstanding the statute of citation an heretick may be cited to appear before him upon letters of request from the Judge of the peculiar, or by process *sub mutuo*, &c. and therefore he cannot decree a citation, &c.

On the 2d of *March* Dr. *Pelling* appeals to the Delegates, upon which the Queen appoints a Court of Delegates upon the 1st of *July* 1713; the matter came to be heard before the Delegates, and it was insisted on by Dr. *Paul* and Sir *Peter King*, that a superior Judge is not obliged to accept letters of request, for no law saith that he is so obliged, and it would be inconvenient since the fees would all belong to the inferior Judge, and unreasonable since the superior Judge cannot oblige the inferior to grant such letters of request, and therefore ought not to be obliged to accept them.

[201]

Secondly, The inferior Judge in this case had no jurisdiction, for he cannot excommunicate, degrade or deprive. *Stat. (1) 2 H. 4. c. 15.* speaks of the Bishop of the diocese, and so is *10 H. 7. c. 17.*

Thirdly, The Bishop of the diocese hath jurisdiction in case of heresy in places exempt.

Fourthly, There was no cause depending before Dr. *Harwood*, and the Arches have jurisdiction only in case of appeals by patent.

But it was answered by Sir *Nathaniel Loyd*, myself, and Dr. *Henchman*, and so resolved by the Court of Delegates, that the refusal of the citation by Dr. *Bettesworth* was a fault for which this appeal was proper. For First, Dr. *Harwood*, the Judge of the Exempt Jurisdiction, had a jurisdiction in the cause, tho' he could not inflict the censures of degradation or deprivation.

(1) This statute is repealed by the stat. 25 Hen. 8. c. 14.

Secondly,

PELLING &
WHISTON.

Secondly, The Bishop of the diocese had no jurisdiction in this case ; for by the stat. 23 H. 8. c. 9. no person shall be cited to appear before any Ordinary, Archdeacon, Commissary, Official or other Judge Spiritual, out of the diocese or peculiar jurisdiction where the person cited is inhabiting at the time of citation ; unless, first, for any spiritual offence omitted or committed by the Bishop or other Spiritual Judge.

Secondly, For cause of appeal.

Thirdly, In case the Bishop or other immediate Judge do not or will not convene the party.

Fourthly, Or be party directly or indirectly.

Fifthly, Or in case the Bishop, or other inferior Judge by right or commission make request to the Bishop, or other Superior Ordinary, to determine in cases where the canon law or civil law affirm execution of such request to be lawful.

[202]

Therefore the Bishop by the express words is restrained in all cases, except those five, from citing any to appear before him dwelling in peculiars ; and consequently in case of heresy, as well as any other. *Cro. Car.* 162. *Cadwallader* ver. *Brian*.

But by a proviso in this (a) statute every Archbishop may cite any person dwelling in any diocese within his province for cause of heresy, if the Bishop or other immediate Ordinary consent, or do not his duty in punishing the same.

(a) St. 23 Hen.
8. c. 9. s. 4.
3 Inst. 40.
1 Hawk. P. C.
p. 6.

It is true, the Bishop upon request from an inferior Judge may cite, &c. but such inferior Judge must be subordinate to him : but the Dean and Chapter of *St. Paul's*, having an exempt jurisdiction, are not subordinate, but in an equal degree with the Bishop ; the person exempt, as *Linwood*—expresses it, *Vices gerit Episcopi* ; and therefore the letters of request from *Dr. Harwood* ought to be to the Archbishop, who is his superior Ordinary, and not to the Bishop of *London*.

PELLING v.
WIMSTON.
Where a man
has *bona notabi-*
lia in several pe-
culiars admini-
stration is to be granted by the Archbishop. 4 Inst. 335. 1 Rol. Abr. 909. Raft. Ent. 324. Swinh.
417. 4 Burn's Ec. L. 189.

If a man have *bona notabilia* in several peculiars, admini-
stration shall be granted by the Archbishop, not the Bishop.
Per Twisden and Windham, 1 Lev. 78.

A suit in the
Arches against
any in the
diocese of
London is good.
Quære. 1 Gibb.
Cod. 1005.
4 Burn's Ec.
Law 390. (a) 1 Keb. 638. 647. 651. 669. S. C.

A suit in the Arches against any in the diocese of *London* is
good; for there was an antient composition between the
Bishop and Archbishop, which amounts to a general licence.
Cro. Car. 339. Dub. (a) Ray. 91.

And when a suit is in the Archdeacon's Court, request shall
be made to the Bishop, for the power of the Archdeacon was
derived from him, and not to the Archbishop *per saltum*.
Hob. 16. 186.

[203]
(b) 1 Keb. 367.
1 Sid. 90. pl. 11.
S. C.

So where a peculiar is subordinate to the Bishop, as it may
be! *M. 14 Car. 2. Tull ver. Osbertson. (b)*

Since then the Arches, which is the Court of the Arch-
bishop, is the superior ordinary, to whom the cause ought to
be transmitted from the peculiar of the Dean and Chapter of
St. Paul's the Judge of the Arches by refusing a citation, &c.
denied justice.

Whereupon the Delegates reversed the sentence, and order-
ed a citation for Mr. *Whiston* to appear before them, which
was served; and Mr. *Whiston* put in an allegation to the jurif-
diction, that the Delegates are not *judices competentes*, being
impowered by their commission only to hear and determine a
cause of appeal between Dr. *Pelling* and Dr. *Bettefworth*, to
which Mr. *Whiston* was no party; and that they had no origi-
nal or ordinary jurisdiction by their commission, &c.

D E

Termino Pasch.

10 Annæ. In C. B.

Parslow *vers.* Cripps.

Case 121.

THIS was an action upon the case, for rescuing a distress taken for rent, contrary to the statute (*a*) 2 *W. & M.* Upon a special verdict, the case appeared to be this: A tenant at will had a judgment and execution against the plaintiff by *feri facias*, and upon the *feri facias* the sheriff seized the corn growing on the land, and sold it to the defendant, and after the return of the *feri facias* was passed, the defendant severed the corn from the land; and during the time the corn lay upon the land in ricks and swarfs, the plaintiff being lessor of the land, distrained the corn lying on the land for rent arrear; then the defendant took and carried away the corn, upon which the plaintiff brought this action against him upon the statute *W. & M.* for a rescue. And if this taking was a rescue, the jury found for the plaintiff, otherwise for the defendant.

Where corn is taken in execution and sold by the sheriff, and the vendee permits it after severance to lie on the ground, it is distrainable for rent. *Gilb. on Distresses*, and edit. p. 26. 2 Br. Abr. 108. (*a*) St. 2 W. & M. c. 5. s. 3. (1)

It was argued for the plaintiff, that by this statute corn is made distrainable upon the land, and therefore this distress is warranted by the express words of the statute. But before this statute, corn could not be taken in execution by the sheriff upon a *feri facias*, if it was not severed before the return of the writ, for the corn till severance is parcel of the land, and

1 Salk. 368.
3 Com. Dig.
298.

(1) The provision made by this act is extended by the stat. 11 Geo. 2. cap. 19. s. 8 & 9. 3 Bl. Com. p. 10.

PARLOW v.
CRIPPS.

If a lessee at will determine his will, he shall not have the emblements. 2 Bl. Com. 146. 5 Co. 316. a. 1 Roll. Abr. 726. 1 Com. Dig. 599. Cro. Elis. 461. Gouldsb. 190. Dougl. 205. (a) Co. Lit. 55. b.

[*205]

Infra p. 355.

The goods of a stranger if found upon the premises are distrainable for rent. 3 Bl. Com. 8.

goes with the land in all cases, except where the tenant has an uncertain interest, and his interest determines by the act of God or of the lessor, or otherwise * without his default. If a lessee at will determines his will himself, he shall not have the emblements, but his lessor shall have them. *Co. Lit. (a)*. And therefore, if after execution and sale by the sheriff in this case the lessee had determined his will himself, the lessor would have had the emblements; and it would be inconvenient if the sheriff upon an execution should sell goods in which the party had no property; for perhaps the property might be in the lessor. The corn likewise at the time of the sale was not in the same plight as at the time of the severance, for it received nourishment and increase afterwards from the land; and if the sheriff should be allowed to sell upon an execution immediately after the sowing, he would sell goods which were not then in the defendant, against whom the execution was, but which afterwards received their nourishment and value from the lands of another: But if the sheriff may sell the corn upon a *feri facias*, yet the vendee shall not be in a better condition than a grantee of the tenant or stranger; and therefore if the vendee permits the emblements after severance to lie on the ground, they are distrainable for the rent of the land, as well as they would be after the sale of them by the lessee himself, or as the goods of the stranger, if found upon the land, may be distrained.

Case 122.

Fyson *versus* —, In C. B.

In an action against a bankrupt for debt due before he became a bankrupt, he may plead that the cause of action accrued before his bankruptcy; but he must plead it *Vigore Statuti*. Com. Dig. tit. Bankrupt. (D. 35.) Vol. 3. p. 53.

THIS was an action upon the case upon an *Indebitatus Assumpsit*. The defendant pleads, that since the 1st of June 1705. *ante impetr' orig'* he became a bankrupt within the several statutes concerning bankrupts, *quodque causa action' accrevit* before the defendant was a bankrupt, *et de hoc pon' se sup' patriam*. Upon this the plaintiff demurred, and shewed for cause, first, That it did not appear when the cause of ac-

tion

tion arose. Secondly, That the plea concluded to the country, whereas it ought to have been with an averment.

FRYSON v.

But without any regard to these reasons the Court held the plea bad; because it did not shew that the defendant was intitled to this plea within the statute 4 & 5 Anne, c. 17. (1) for the plea is bad at common law, and when a statute allows such a plea, the defendant must shew that he pleads it *Vigore stat.* and it is not like the cases where a statute gives liberty to plead the general issue and to give the special matter in evidence; for here the statute does not give any authority to plead the general issue, but to plead generally in such manner, and therefore he must shew that he pleads in such manner by virtue of the statute.

[206]

1 P. Wms. 358.
Fort. 334.

(1) This Act expired on the 26th June A. D. 1716 1 Com. Dig. 533.

Chambers *vers.* Shaw. In C. B.

Case 123.

IN an action against an executor, who pleads several bonds due from the testator, and several judgments against himself as executor, and that he had not assets *ultra* what was subject to the judgments recovered, the plaintiff replies as to the bonds, that they were obtained by fraud, and that the defendant had assets *ultra* the judgments; and upon this, issue was joined; and upon the first issue the jury found for the defendant; and upon the other for the plaintiff; and it was now moved that the plaintiff might have judgment. But *per Cur.* he cannot; for though the issue is found that the defendant had assets *ultra* the judgments, yet when it is found for the defendant upon the other issue, then it appears that the bonds were given for true debts, and the plaintiff cannot recover if there are not assets more than will satisfy those bonds as well as the judgments.

If an executor pleads bonds and judgments, and no assets *ultra* the judgments, and the plaintiff replies that the bonds were fraudulent, and it is found against him, he cannot have judgment, though the assets are found to be *ultra* the judgments pleaded. 1 Ld. Raym. 679. Carth. 195. 431.
2 Saund. 48.
2 Keb. 591.
S. C. Com. Plead. (2 D. 9.) vol. 5. p. 202.

Case 124. *Thornby vers. Fleetwood.* (1) Int. Trin. 9 Annæ,
In C. B.

A recovery suffered by a person
broad a papist,
and instructed in
a seminary or
College of Je-
suits beyond sea
in the popish re-
ligion, was hol-
den good, not-
withstanding the
stat. 1 Jac.
1. c. 4. f. 6.
3 Jac. 1. c. 5.
and the 3 Car.
1. c. 2.
10 Mod. 113.
356. 406. S. C.
1 Str. 318. S. C.
Lilly's Ent. 524.
2 Brown's P. C.
203. S. C.
11 Mod. 355.
S. C. Harg.
Co. Litt. 132.
b. n. 1. 2 P.
Wms. 362.
Infra p. 668.

THIS was an action of Ejectment upon the demise of
the Duke and Duchefs of *Hamilton*; and upon a trial
at bar in the Common Pleas, there was a special verdict to this
effect.

Thomas Lord Gerrard ob' 1617. had issue,

Gilbert ob' 1623,

John, ob' 1673,

who had issue

who had

Dutton, ob' 1640, and *Alice* married to *Richard*, ob' 1679,

who had *Roger Owen*, who had four sons, viz.

Charles, ob' 1667, who had *Charles, William,*

who had *Thomas Owen, Philip, Joseph,* and

Digby, ob' 1684, who had one daughter

who had *Roger Owen* now *Frances*, married to

Elizabeth, Duchefs living. the defendant.

of *Hamilton*.

Charles, William and *Jo-
seph* died without issue.

Philip is now living.

Charles Lord Gerrard was seised in fee of the lands in ques-
tion, and by settlement dated the 28th and 29th of *November*
12 *Car. 2.* on his marriage with *Jane Digby*, settled them to
the use of himself for life, remainder to his wife for life, then
to the first and other sons of that marriage in tail male, remain-
der to himself and the heirs of his body; remainder to the
heirs male of the body of *Thomas Lord Gerrard* his great
grand-father, remainder to his own right heirs.

That *Charles Lord Gerrard* died leaving *Digby Lord Gerrard*
his son and heir who died on the 8th of *November* 1684 with-

(1) The Roman Catholics are now
relieved by force of the statute 31 *Geo.*
3. c. 32. from several penalties and dis-

abilities to which they were formerly
subject.

out issue male, leaving *Elizabeth* now Duchess of *Hamilton* his only child and heir.

THORNEY V.
FLEETWOOD.

That *John*, the younger son of *Thomas* Lord *Gerrard*, and *Richard* his heir, died before *Digby* Lord *Gerrard*, and that *Richard* in his life placed his sons *Charles*, *William* and *Philip*, at *St. Omer's* beyond the seas, under the obedience of the King of *Spain*, to be educated in the Popish religion; that they resided there for five years in a seminary or College of Jesuits, and were instructed in, and there professed the Popish religion. That *Charles* returned in the year 1681, and after the death of *Digby* Lord *Gerrard*, entered as heir male of the body of *Thomas* Lord *Gerrard*, and in *Pasch.* 1 *Jac.* 2. suffered a common recovery, and by an indenture dated the 22nd of *May*, 1685, declared the uses to himself and his heirs, and afterwards made a settlement on his marriage, and after the death of Lady *Jane* the wife of *Digby* Lord *Gerrard*, viz. — 1703, suffered another recovery to the use of himself in fee; that *William* and *Joseph* died without issue, and then *Charles* died on the 27th of *April* 1707, having always professed the Popish religion, but that *Philip* is now alive and professes the Popish religion.

[208]

That *Roger Owen*, who is descended from *Alice*, is his next of kin, being a protestant.

That after the death of *Charles* without issue, the defendant in right of *Frances* his sister entered, upon whom the Duke and Duchess of *Hamilton* entered, and being ousted by the defendant, brought their ejectment.

This special verdict came on to be argued in *Trin.* 11 *Anna* by Serjeant *Hooper* for the plaintiff, and by Serjeant *Pengelly* for the defendant, and in the *Mich.* following by Serjeant *Pratt* for the plaintiff, and Serjeant *Selby* for the defendant, and in the *Hilary* term following by Sir *Thomas Powels* for the plaintiff, and Serjeant *Chebbire* for the defendant; and now *Trevor C. J.* delivered the opinion of the Court, who all agreed that judgment should be given for the defendant. Upon which a writ of error was brought in the King's Bench upon a judgment given

THORNEY W.
FLEETWOOD.

in the Common Pleas for the defendant in this case, in *Easter* term 11 Annæ, and for the better understanding of the arguments on the writ of error, I shall give the resolution of the Court of Common Pleas, which was delivered by Ch. J. *Trevor*, when judgment was given there for the defendant.

[209]

And he said that the title of the lessors of the plaintiff was upon the construction of the stat. 1 Jac. 1. c. 6. 3 Jac. 1. c. 5. and 3 Car. 1. c. 2. for the lessors of the plaintiff cannot have any title to the lands in question, if there is not such a disability by reason of those statutes, as to make the recovery suffered by *Charles Lord Gerrard* void, and the estate-tail determined, or at least cease; for the lessors claim in remainder, and if the recovery be good, their remainder is barred; or if the recovery is not good, yet if the estate-tail is not determined, *Philip* is heir in tail, and alive, and may have issue inheritable to the same estate-tail; and then the lessors, who claim by force of a remainder subsequent to such estate-tail, cannot enter.

And he said, that the counsel for the plaintiff had only insisted upon the statute 1 Jac. 1. c. 4. for the subsequent statutes could not give him any title; and the question upon them was, if they had altered the statute 1 Jac. 1. c. 4. and therefore the counsel for the plaintiff had argued, that by the stat. 1 Jac. c. 4. there was such a disability in *Charles Lord Gerrard* that his recovery was void, and that *Philip* being disabled in the same manner, and no other person being *in esse*, who could take the estate-tail, the lessors of the plaintiff by consequence were intitled as if the estate-tail was actually determined; for it was not insisted on (neither was there any colour for it, that by the latter statutes the lessors of the plaintiff had any title; for the stat. 3 Car. 1. c. 2. gives the forfeiture upon conviction to the King for the life of the convict; and therefore all that was urged by the plaintiff's counsel in respect of those acts was, that by them the stat. 1 Jac. 1. c. 4. was not altered, but enforced; and therefore the only matter to be considered is,

First,

First, What would be the operation and effect of the statute 1 Jac. 1. c. 4. if the others had not been made.

THORNEY &
FLEEWOOD.

Secondly, If the stat. 1 Jac. 1. c. 4. be enforced, or repealed, or altered by the subsequent statutes.

As to the operation and effect of the stat. 1 Jac. 1. c. 4. by which it is enacted, that every person, &c. who shall go or shall send any child, &c. beyond sea, to the intent to enter into any college, seminary, house of Jesuits, &c. to be instructed in the Popish religion, &c. the person sending, &c. shall forfeit 100 l. and the person passing with such intent, &c. shall in respect of himself only, and not of his heirs or posterity, be disabled to inherit, purchase, take, have or enjoy any manors, lands, &c. and that all estates, terms, and other interests hereafter to be made, suffered or done, to or for the use or behoof of such person, &c. shall be void, and any in such seminary, &c. who shall not return in a year and submit, &c. shall in respect of himself, and not of his heirs or posterity, be disabled to inherit, have or enjoy any manors, lands, &c. provided if any person so sent, sending or being in such seminary, &c. shall after become conformable, &c. he shall be discharged of all such disability.

[210]

Upon this statute it was difficult to tell the effect of this clause, what was the consequence of the disability, and who should have the land of a person disabled during his disability.

The Counsel for the plaintiff have insisted, that where the estate descended before the disability incurred, he was only disabled from taking the profits; but where the descent was after the disability incurred, there the disability prevented him from taking the descent. But it would be a hard construction of the same words, to make here a different interpretation, which will not serve all cases upon this act, tho' it serves the case of the plaintiff in the present question: for if an estate in fee was to descend to a person disabled, if he could not take it by descent, who shall take the lands? His

THORNEY v.
FLEATWOOD.

heirs cannot have them, for *non est hæres viventis*, and he cannot claim as heir to him in his life; and therefore by such a construction none can take them at all; and then the person disabled shall have the lands from necessity, for no one can take them from him. If the person disabled shall purchase lands, his heir shall not have them, as his heir till after his death; and therefore the purchaser must have the lands, for no one can recover them from him.

[211]

The disability in this act is not like the disability of a monk (2), or a man professed, for he is dead in law; but a person disabled by this act is not dead in law, nor subject to an absolute incapacity, for he shall enjoy the lands after his conformity.

And therefore the natural construction of the words is, That he shall be disabled from taking the profits of the lands; and when this construction is allowed, where the descent was prior to the disability incurred, it will be reasonable that the same words should have the same construction, where the descent is subsequent to the disability.

When an act of parliament gives a forfeiture generally, the law determines that the King shall have it. Moore 238. pl. 371.
21 Co. 68. b.
10. Mod. 121.
S. C. 1 Str.
323. S. C. 335.
11 Mod. 367.
S. C. Vin. Abr.
Tit. Forfeiture,
(1) pl. 6.
(2) 3 Lev. 289.
S. C.

And this is not only the natural, but also the legal construction of the words; for when the act gives a forfeiture of the profits of the land, and does not say who shall have the forfeiture; this being for a public crime and offence against the government, the law will give the forfeiture to the King: for though for a private wrong the penalty shall sometimes by way of recompence (3) belong to the party grieved, yet for a public offence the law will give the forfeiture to the King, as the Head of the public; so it was resolved 2 Vent. 268. (a) So in other cases, if the statute does not say to whom the forfeiture shall belong, it shall of necessity belong to the King;

(2) There is no longer any legal establishment for *professed persons* in England, therefore the law respecting them is become obsolete. Haig. Co. Litt. 3 b. n. 7.

(3) The stat. 2 & 3 Edw. 6. c. 13. which gives the forfeiture of treble the value for the not setting out of tithes, is of this description. 2 Inst. 650.

for it cannot belong by implication to one subject more than to another.

THORNEY &
FLEETWOOD.

So upon the statute 1 Jac. it was uncertain whether the King was intitled to the penalty before conviction. But all those doubts are explained by the statute 3 Car. 2. c. 2. The statute 3 Jac. seems to be intended for another purpose; for by that it was enacted, that if the children of any subject, to prevent good education, or for any other cause, be sent or go beyond sea without licence, &c. they shall take no benefit by gift, conveyance, descent, devise or otherwise of or to any lands, &c. till he being eighteen, take the oaths, &c. But in the mean time the next of kin not being recusant, &c. shall enjoy, &c.

This statute 3 Jac. was not intended to repeal the statute 1 Jac. and does not prohibit the same offence; for by the statute 1 Jac. the person sent to be educated in seminaries, &c. was restrained from taking, &c. By the statute 3 Jac. any person going beyond seas without licence, &c. though he never was in any seminary, &c. and though he goes for any cause whatsoever, &c. and therefore *Tredway's case*, (a) *Hob.* 73. does not relate to the stat. 1 Jac.

[212]

(a) *Jenk.* 297.
S. C. Ley 59.
S. C. 1 *Sir.* 324.

But by the statute 3 Car. the intention appears to be for the same purpose as the statute 1 Jac. for the title is to restrain the passing or sending any to be Popishly bred beyond sea.

So the preamble takes notice, that divers have sent children to be bred up in Popery, notwithstanding the restraint by the statute 1 Jac. and therefore, it enacts, that the statute of 1 Jac. be put in due execution, and it extends to all offences restrained by the statute 1 Jac. and more; for any sent into Popish families to be instructed, &c. will be within the statute 3 Car. 1. as well as persons sent to colleges, &c. So it extends to all monies, &c. sent for the relief of any such children, &c. which was not within the statute of 1 Jac. so it gives the same penalty against any person sending, &c. (who by the statute of 1 Jac. was only to forfeit 100 l.) as against the

The stat. 3 Car. 1. c. 2. extends to more offences than those restrained by the stat. 1 Jac. 1. c. 4.

THORNEY v.
FLEETWOOD.

person sent; so it gives the penalty only upon conviction by indictment or information, which was not declared before by the statute 1 Jac. so it gives all the penalties mentioned in the statute 1 Jac. and also that the offender shall not sue nor be a legatee, &c. so it says he shall forfeit, &c. (in the same words as are used in 1 Jac.) to the Crown, &c. which was not expressed in the statute 1 Jac.

So it requires conformity in six months, which by the statute 1 Jac. might be at any time, and upon conformity restores the party to his lands, and does not discharge the other disabilities, whereas the discharge by the statute 1 Jac. was general.

The stat. 3 Car. 1.
c. 2. enlarges and
enforces the stat.
1 Jac. 1. c. 4.

The statute of 3 Car. 1. c. 2. therefore does not repeal, but enlarges and enforces the statute 1 Jac. by which it appears, that the measure of the disability in the statute of 1 Jac. must be governed by the statute 3 Car. 1. c. 2. and tho' offences before the statute 3 Car. continue punishable by the statute 1 Jac. yet all offences since the statute 3 Car. are to be punished according to the direction of the statute 3 Car. and consequently the disability and forfeiture upon the statute 1 Jac. and 3 Car. will be, that the person disabled shall lose all his lands to the King upon conviction during his life, if he does not afterwards conform.

[213]

And for these reasons judgment was given for the defendant in the Common Pleas.

But it was now argued in the King's Bench, upon a writ of error, by Sir Thomas Powis King's Serjeant,

First, That by the Statute 1 Jac. 1. c. 4. s. 6. Charles Lord Gerrard was a person disabled from taking the estate, and that his brother Philip being under the same disability, could not take the estate-tail in remainder limited to him, and consequently the remainder in fee to the lessors of the plaintiff shall take effect, and the estate vest in them.

Secondly, That the Stat. 3 Jac. 1. and the Stat. 3 Car. make no alteration in the construction of the statute 1 Jac. 1. c. 4. s. 6.

Thirdly,

Thirdly, That the recovery suffered by *Charles* Lord *Ger-*
vard will of consequence be void.

THORNEY V.
FLEETWOOD.

As to the first point he argued, that the Statute 1 *Jac.* was made at a critical juncture, when there was a great contest between the Papists and the Protestants, and therefore the Legislature without doubt intended a severe penalty upon those who educated their children in Popery. The Statute 27 *Eliz. c. 2. s. 5.* which prohibits sending relief to any Jesuit, &c. or any other in seminaries, was but a temporary law; and therefore by the Stat. 1 *Jac.* the restraint was positive and perpetual, and the offender is put under a disability to inherit, purchase, take, have or enjoy any manors, lands, &c. which words import that he shall be disabled to inherit, purchase, or take any lands, &c. so as that lands shall never vest in him, if the disability was incurred before descent or purchase; that he shall be disabled to have or enjoy them, if they were vested before the disability incurred.

And that by these words lands never can vest in such person who is not capable of taking, is evident from the words themselves, and was so resolved 11 *Co. 1. b.* Lord *De-*
laware's case, that *William* was not Baron, but only an Esquire, by which it appears, that the Barony never vested in or descended to him.

[214]

1 Vent. 416.
2 Roll. Rep. 418.

So by the Statute (a) 11 & 12 *W. 3.* the words are in the Statute 1 *Jac.* by which the person disabled, who cannot inherit, purchase or take, cannot take by disseisin, or by a tortious entry take or gain any freehold, for if he could, the act would be evaded: So in case of simony the person is quite disabled for ever. (4)

(a) St. 11 & 12
W. 3. c. 4.

If

(4) This assertion must be taken in a restricted sense. If a person is privy to a simoniacal contract, he is for ever disabled from being presented to that benefice which was the object of the contract; but this disability extends no farther, and he still remains eligible to

any other benefice. — The following words of the statute are very plain to this purpose, " And the person so corruptly taking, procuring, seeking, or accepting any such benefice, dignity, prebend or living, shall thereupon and from thenceforth be adjudged a disabled

THOMAS V.
FLEETWOOD.

If it be objected, that by such a construction the heir will be defeated, though it appears by the act that he shall take; that is a mistake; for when the right of the heir is saved by the act, he shall take by descent, though the estate never vested in his ancestor; as in the case of Lord *Delaware* it was holden that the son took the Barony by descent, though it never was in his father; and it would be unreasonable to make such a construction of the statute in order to preserve the right of the heir or of posterity, which is but the secondary intention of the statute, as would defeat the primary intention of the statute (*viz.*) the disabling the offender.

With regard to the proviso, that the offender shall be discharged from his disability upon his conformity, without any words of restitution, it seems to be added for the satisfaction of some ignorant Burgefs, or shall serve the heir in pleading to make his descent.

The words of the act, that he shall be incapable to take any lands, manors, &c. cannot be satisfied by a disability to take the profits of the land; and if the intent of the statute had been such, it would have been said in express words, and another would have been named to take the profits in the interim, as it was in the Statute 3 Jac. and the omission of one to take the profits in the interim was proper, where the estate never vested in the party. If it be said that the King shall take the profits, yet it would be in the power of the party to prevent the King by alienation, and therefore such a construction, as does not allow the estate to vest, answers better to, and promotes the end of the statute, which would be avoided if the party could dispose of his estate, which he might do if it vested in him; and such construction will the better deter parents from sending their children to be educated beyond sea, when they find it to be so penal; and Judges ought by their interpretation to make laws for the pro-

[215]

20 Mod. 117.

disabled person in law to have or enjoy the same benefice, dignity, prebend or living ecclesiastical." Stat. 31 Eliz. c. 6. s. 5. Rolle is of the same opinion respecting the construction of the statute.

1 Roll. Rep. 237. 3 Bulst. 91. Hob. 75. Cun. Law. of Sim. 33. Cro. Jac. 386. Gibb. Cod. 801. Absolute disability is the punishment of simony by the Canon Law. 3 Burn's E. L. p. 347.
motion

motion of religion answer their design, though the words may be imperfect for that purpose. *Hob. 157. 11 Co. 70, 71.* more especially when the words are plain and positive, as here; and penal laws have been construed by intendment, *11 Co. 34.* and it cannot be denied but that the mischief intended to be remedied by this act is very great with regard to religion. It is also a rule in the construction of statutes *in dubio* to adhere to the words, and by the words no common persons can think any thing else was intended but that the offending party should never take any lands, &c. The construction on the other side is advanced only to preserve the estate to the heir, but there is no necessity that the heir shall be excluded by our construction; for in Lord *Delaware's* case it was resolved, that the heir should take the Barony, though it never vested in the ancestor.

But it is asked, in whom shall the estate be, if it is not in the party? surely it shall not be in him, if it can be in any other, for the statute says expressly to the contrary; *Et viperina est constructio quæ corrumpit viscera textus.* All that is a necessary consequence of a statute, is as strong as if it was in the statute itself. *Hob. 293. Brook Tit. Coron. 204.* If a statute says a man shall lose *vitam & membra*, it will be felony, tho' the statute does not name the offence felony. And therefore Judges ought to enlarge the construction of a statute in favour of the intention, and not oppose rules of law to defeat the intent. In whom then shall the estate be? It cannot go to the King, if it never was in the party; it cannot go to the issue in tail, for *non est heres viventis.* And therefore of necessity it must go to him in reversion. It is then objected, how shall it return to the party upon his conforming? for the statute has no words of restitution. To which I answer, that the intent of the act is not clear, that the estate which is gone to another shall re-vest upon conformity; but if the intent be so, the same act which makes the incapacity makes it re-vest, and therefore there is no necessity for any words of restitution; as where a statute repeals another act of repeal, the former statute is revived without any words for that purpose; and it is no new case, that an estate shall cease for a time by virtue of an act of Par-

liament,

THORNTON v.
FLEETWOOD.

Penal laws have
been construed
by intendment.
Plowd. 10. 46.

[216]

Where a statute
repeals an act of
repeal, the for-
mer statute is re-
vived.

4 Inst. 325.
2 J. n. 22.
1 Bl. Com. 90.
10 Mod. 411.
1 Str. 338.

TORNEY v.
FLATWOOD.

Parliament can
controul the
rules of law.
Co. Litt. 27. a.
Cro. Eliz. 379.
1 Co. 87. b.
10 Mod. 412.
(a) St. 21 H. 8.
c. 13. f. 9.

liament, and afterwards revive, as appears by the Prince's case, 8 Co. 17. a. 27. a. So *Raym.* 355. in the Earl of Derby's case, it is said that the Judges ought not to construe the limitations of an act of Parliament made for a particular purpose by the strict rules of law, for the Parliament can controul the rules of law, 13 Co. 64. can make a freehold cease as if the party was dead. So by (a) 21 H. 8. the freehold of a person who accepts a second benefice with cure ceases. 6 Co. 40. b. The construction of statutes ought to be according to the rules of reason and convenience, *Hob.* 346. for laws are made *secundum æquum & bonum*, agreeable to the rules of natural equity, which is *Lex legum*, *Hob.* 224. and therefore where the intention of a law cannot be attained by a construction according to the usual rules of common law, the Judges ought to intend that the Parliament waived them, as in the Prince's case, 8 Co. 16. b. Where the Dukedom of Cornwall was limited *eidem duci & ipsius & hered' suor' Regum Angl' filiis primogenit' & dicti loci ducib' heredit' successoris*; upon which it was resolved that the Dukedom should descend to the eldest son of the King, and such King who is heir to Prince Edward, who should take in the life of his father, which could not be by the rules of law.

[217]

10 Mod. 412.
Cm. Car. 478.
1 Jones 40. 394
1 Co. 87. b.
8 Co. 72. a.
1 And. 19.
2 Inst. 681.
1 Brownl. 147.

There are many cases where by act of Parliament an estate may cease for a time, and afterwards revive, cease as to one, and revive as to another; as in *Beaumont's* case, 9 Co. 138. *Hob.* 257. So where baron and feme are tenants in tail, to them and the heirs of their bodies, and the baron levies a fine and dies, the estate revives as to the wife, who shall be tenant in tail, and then ceases as to the issue, who shall be barred by his father's fine.

So an estate may be in abeyance for a time. 1 *Inst.* 345. a. *Lit. sect.* 646, 647. 649, 650. So a person if being shall be passed over as if he was dead, as a man professed. 2 *Ro. Ab.* 150. b. So an estate may go to him in reversion, and afterwards return; as if tenant in tail dies without issue born, and his wife is *enscint*, if a son be afterwards born, he shall take by descent. 7 Co. 8. b. *Bro. Tit. Divorce*

3 Rep. 61. b.
10 Mod. 362.

18. And therefore when the statute 1 Jac. 2. made an incapacity to take,

THORNTON v.
FLEETWOOD.

The next thing to be considered is, whether any subsequent statutes have altered the law in this point, and so taken off the disability.

It is not contended on the other side, that there ever was any express repeal of this statute, but the most they insist on is, that it is inconsistent with the subsequent statutes, and so implicitly repealed, according to the rule, *leges posteriores priores contrarias abrogant*.

But before he entered upon the consideration of the consistency or inconsistency of the statute, he observed that repeals by implication are to be used very tenderly, because they infer a very high reflection upon the law-makers, as if carelessly and unknowingly they made inconsistent laws. 11 Co. 63. a. 1 Rol. 91. S.C.

10 Mod. 112,
123.

It was given up in the Common Pleas, and agreed in this Court, that the statute of 3 Jac. relates to different persons and different offences from the statute of 1 Jac. 1. and therefore he should pass it by and take no notice of it.

The statute 3 Car. is that which is set up by the other side to be the governing act and implicit repeal of the statute of 1 Jac. notwithstanding it enacts it to be put in due execution; which is sufficient to that shew that it was not intended as a repeal.

[218]

It was said upon a former argument, that the statute of 1 ac. was made upon a pinch, and when the bent of the nation was against the papists; and it being very severe upon them, the statute of 3 Car. was made to mitigate those penalties.

In order to answer this pretence, he resumed the historical part of the case, and considered the circumstances of the nation at the time of making the latter statute. During Queen Elizabeth and King James's reign, the people were very jealous of the designs of the Papists, and therefore we

THORNTON &
FLEETWOOD.

see by several acts of parliament endeavoured to fence against them as well as they could. Upon King *Charles's* accession to the Throne, their suspicions were rather increased than diminished; the King was then newly married to a daughter of *France*, a *Roman* catholic, and several favors were at that time shewn to the Papists; this occasioned great uneasiness and disquiet to those of the protestant reformed religion, which afterwards broke out into an open rebellion, and ended in the murder of that Prince and the banishment of his sons.

It is very well known that the Parliament which enacted this law was far from being acceptable to the Court, and therefore it was suffered to continue but a short time, and then followed the long intermission of Parliaments.

As this Parliament was not in the interest of the Court, so they were highly incensed against the Papists, who they began to fear were likely to gain ground upon them; and therefore they set themselves at work to attack them in that which was their weaker place, namely, in taking away the estates which were vested before the offence committed. The statute 1 *Jac.* 1. incapacitated them to take, and the statute 3 *Car.* to keep.

[219]

As to which the former statute was doubtful; if it should be construed that the measure of all these disabilities must be by the statute 3 *Car.* then that Parliament, instead of distressing the Papists, as was intended, has rendered their condition more easy; for on the statute 3 *Car.* a conviction is requisite, to avoid which they may keep abroad, and have the profits of their estates transmitted to them; for they will be out of the reach of any process necessarily previous to a conviction.

But the main end and design of this latter statute (which has not been mentioned) was to lay a heavier punishment on the person sending, who before forfeited 100*l.* only; the child sent, who was the most innocent, bore all the resentment of the statute, whereas now both are put upon the same level,
and

and some new disabilities are created; as being executors, &c. and it likewise extends to private schools, which the other did not.

THORNTON W.
FLEETWOOD.

Thirdly, He came then to consider, what influence the common recoveries and the life of *Philip* will have in prejudice of the Duchess's title.

Now as to this point he insisted, that what he set out with will principally govern it; for if the second *Charles* never had the estate in him (as according to my former reasoning he never had) then the recoveries will be void, as suffered by a person out of possession; as if the issue in tail should suffer a recovery in the life-time of his father.

A fine indeed he may, but that is by the express provision of the statute 32 H. 8. c. 36. As to the life of *Philip*, his objections, as to the estate's being in abeyance, and the way he had shewn how he or his issue may be restored on conformity, will be sufficient to remove that obstacle.

But to come closer, say they, whilst there is issue the reversioner cannot enter.

He denied that; in this case issue must be heir of the body. *Hob.* 346. *Dy.* 332. *Plow.* 560. and he must be issue inheritable, which *Philip* is not; he is disabled, and cannot call for the estate according to 1 *Vent.* 417. He is to be considered in consanguinity, but not as heir; and if he himself cannot take, his issue cannot, (admitting him to have issue, which is not found, and is not so in fact; so that the argument is only from a possibility of his having issue) for it is not enough, that he has issue, unless such issue be heir of the body to claim the intail; and heir of the body he cannot be in the life of *Philip*, for *nemo est heres viventis*. My Lord Coke 1 *Inst.* 377. a. puts the case of tenant in tail, to him and the heirs male of his body, and he has issue a daughter, who has issue a son; a grandson, says he, shall not keep out the reversioner, though he be heir of the body, because he does not derive his descent through males; 'tis said

[220]

Co. Litt. 25. a.
10 Mod. 415.
1 Sta 362.

of

THORNEY W.
FLEETWOOD.

of an exile, or one banished, *quod perdidit patriam*, and it will found as well of *Philip*, *quod perdidit patrimonium*.

30 Mod. 415.
1 Str. 337. 362.
(a) Moore 353.
pl. 476. S. C.

We are not obliged to wait for the possibility of his conformity; shall an estate stand suspended, because 'tis possible an alien may be naturalized, or a monk be derained? (a) *Cro. Eliz.* 422. 29 *Aff. pl.* 61. *Plow.* 557. indeed says, there might be an occupant in that case; but this was said only *arguendo*, and 'tis contrary to *Yelv.* 9. 2 *Roll. Ab.* 151, 152. for he must claim by a *que estate*.

If an advowson be granted to *A.* for the life of *B.* and *A.* dies before a vacancy, the grantor shall present, and there shall be no occupancy.

(b) St. 2 W. &
M. c. 10.

2 Hawk. P. C.
560.
10 Mod. 365.
2 Bro. P. C. 209.
1 Str. 362.

(c) Hob. 75.
3 Inst. 154.
Cro. Jac. 386.
2 Gibb. Cod.
307.
3 Burn's E. L.
p. 347.
2 Hawk. P. C.
559.

The next thing relied upon by the defendants is the act of (b) 2 W. & M. of a general pardon, which, say they, has cured all. This has been sufficiently answered by those who have argued before; as there are exceptions in it, and as it is not found, the Court cannot take notice of it. *Hale's Pl. Cor.* 252. *Cro. Eliz.* 125. 1 *Keb.* 20. 1 *Lev.* 26. S. C. *Br. Tit. Char. of Pardon*, 46. *Pleading*, 124. 8 *E.* 4. 7. 4 *H.* 7. 8. the general words might pardon the offence, but would not restore the forfeitures without special words. 1 *Lev.* 120. 1 *Sand.* 362. S. C. If (c) simony be pardoned, yet that does not operate so as to restore the offender to the living. 5 *Mod.* 15.

[221]

The last thing they object is, that *Charles* was in possession all his life, and therefore the recoveries are good; but was this any other possession than that of a wrong-doer? A monk might be a disseisor, and yet it will not be pretended that he had any legal estate in him; no, he was but an occupant at best; and in this case *Charles* was no more; he had, 'tis true, a perannuity of the profits, but that is all; he had not such a possession and freehold, as to enable him to bar the remainder by coming in as vouchee in a recovery.

He desired to know, whether it will be pretended, that if a Papist at this day, since the statute of *W. 3.* should get into possession, and receive the profits of any estate, whether he

he can be deemed to be in legal actual possession? certainly he cannot; he cannot take advantage of his own wrong; and no more shall the tortious entry of *Charles* (for such it was) enure to his benefit, and turn to the prejudice of us who are in reversion.

THORNEY W.
FLEETWOOD.

He said there was one thing more which they press upon him, and that is, that he could shew no instance where this act has been put in execution in the manner he was contending for, or indeed in any other manner.

But he thought he might retort the argument upon them, and demand to know if they can produce any case which seems to look their way, and so much as countenance the construction they have set up; the truth in the matter is still at large, and no argument can be drawn by either side.

Many statutes there are in full force upon which there are no footsteps of any proceedings for many years; and as to this particular statute, he could give them a very good reason why it was never yet drawn in question; they of the same religion will never take advantage of it, and these are people who mostly have it in their power; though in our case indeed the reversioner is a protestant; besides, 'tis very difficult to prove a foreign education, and a being sent abroad with the intent; for the Jesuits, though they were caught in this case, will never be caught again.

None but a man of Duke *Hamilton's* application and interest could have brought them over; but now they know the consequence, they will never be prevailed with to give the same testimony; and as this is the first case upon the statute, so in all probability it will be the last.

[222]

Sir Edward Northey cont': I shall not need to go about to prove a title upon this record for the defendants; for they have a prior possession, and that is sufficient against the plaintiff, who must recover upon his own strength.

The plaintiff relies on the statute of 1 *Jar.* only, but in my argument I shall put them all together, and admit them to be
con-

1 Str. 363.

THORNEY v.
FLEETWOOD.

consistent; for my Lord Coke says, where there are several statutes relating to the same matter, one must not be singled out from the rest, but the construction must be uniform upon them all.

The three statutes now in question were all made with the same view, and to prevent the same mischief; that was to be brought about by laying punishments upon the offenders, and thereby oblige them to conform.

There are two sorts of offenders, those who send, and those who are sent; and these latter forfeit only the profits of their estate; and that was taken to be the consequence of the statute at the time of making it; and therefore the statute 3 Jac. does not make any new law, when it speaks of the profits, but only directs the particular application of them to the next protestant of kin, which under the statute 1 Jac. the King, as *Pater patriæ*, was intitled to. 2 Vent. 187. Woodward and Fox.

The plaintiff does not make the case on the statute 1 Jac. which respects only the intent, but has brought it within the words of the statute 3 Car. for it is found, that they were actually educated; which is carrying the intent to the education.

[223]

I shall put every thing out of the way but the operation of the statutes, as to descents; I would fain know, if this were an estate in fee descended, who should have it; the heir according to their maxim cannot; and shall it escheat to the Lord, as though the whole estate was spent; can it be thought that the statute intended to favour the Lord or reversioner more than the innocent issue? he must be prejudiced, unless it be construed that the profits only are forfeited.

The construction must be, that the ancestor shall take no benefit; that is, he shall not take for the benefit of himself, but he shall take for the benefit of his posterity.

The

The statute 11 & 12 W. 3. (a) has the words, *be disabled to inherit or take*; but yet in the case (5) of *Pye (b)* and *Gorge*, 1 July 1709. in *Canc'*, it was holden, that the subsequent words had controuled the former, and only carried away a pernamcy of the profits, but that the estate descended notwithstanding.

THEOBALD v.
FLEETWOOD.
(a) St. 11. &
12 W. 3. c. 4.
f. 4.
(b) 1 Eq. Abr.
384. E. pl. 1.
1 P. Wms. 128.
2 Salk. 680.
Prec. Ch. 308.

A man may take for the benefit of another, as a man attainted for the benefit of the Crown. 1 *Inst.* 2. b. 2 *Roll.* Ab. 88.

10 Mod. 359.
Vin. Abr. Tit.
Attainder (B)
pl. 5.
2 Leon. 124.

I put all the rules of law out of the case, and come now to the proviso for conformity; and I take it, that upon his conformity the offender is to be *in statu quo*; and if so, how can the estate be revested; there is no provision for it in the statute, and that is an argument that it was never intended that the estate should go over.

My Lord *Delaware's* case, cited by the other side, is a case which has room enough in it to hold us both; it says, that *Thomas* shall claim from *William*, and not through him.

Now the word *from* implies that he was seised, for otherwise he could not claim from him; here the estate-tail is not spent, and therefore the reversion cannot be let in.

It is objected, that the freehold shall not be in abeyance.

I answer, that it is not, it is in the offender; and the statute has power to controul that, or any other rule of the common law.

It is said *Philip* has no issue, and the reversioner must not be obliged to wait upon that contingency.

[224]

(5) There must be some mistake in this reference, as the case of *Pye v. Gorge*, as reported in the books quoted

above, relates to a very different subject to that stated in the text.

THORNEY W.
FLEETWOOD.

I answer we must provide for what may be, as well as what is; the law never sees any impossibility of having issue, and therefore upon a general intail there can never be a tenant in tail after possibility; there is a possibility of *Philip's* having issue, and therefore the estate must continue to serve that possibility when-ever it arrives.

Another objection is, that if we have the estate we may perhaps alienate it.

I answer that the statute never intended to put the issue out of the power of the ancestors, but only that he should not be hurt by the disability of the ancestor, he shall be disabled as to himself, he shall not be disabled as to his heir.

We don't now lie on the recoveries, but set up the life of *Philip* against the plaintiff; I agree if tenant in tail leaves issue an alien, there the remainder-man may enter, because such issue is as none.

If therefore the estate vests, and the profits are only forfeited during the disability, then the lessor of the plaintiff can have no title.

Sir *Thomas Powis* replied. In Lord *Delaware's* case it is said the title never was in *William*, he was only an executor, and this destroys the inference from the word *from*.

As to the case of *Woodward* and *Fox*, it a case *prime impressionis*, and a long while after this statute, so that the law-makers could not know the profits would go to the Crown of course, it not being a case settled till that caie; in *Delaware's* case the same construction was made without the words, which we make with the words.

[225]

I know no body to whom the estate could have gone, in case this had been a descent in fee, but to the Lord by escheat; and it is no new doctrine to divest estates escheated, as on the birth of a posthumous heir, or reversal of an attainder, 3 *Inft.* 231. and the same may be done on *Philip's* conformity.

The

The Court took time to consider, and afterwards in *Mich.* Term 7 Geo. 1. they were divided in opinion, the Lord Chief Justice *Pratt* and Mr. Justice *Fortescue* being of opinion that the judgment below was erroneous and ought to be reversed; Mr. Justice *Powis* and Mr. Justice *Eyre* being of the contrary opinion; whereupon at the request of the Duchess, and for her expedition, the judgment was affirmed; and she bringing a writ of error in Parliament, the judgment was affirmed there likewise by the advice of ten Judges against two.

THORNEY V.
FLEETWOOD.

2 Bro. P. C.
204. 216.
Andr. 104.

Term. Sanct. Trin.

1 Geo. In C. B.

Case 125.

Hunt *versus* Coles & al'.

If a trustee has conveyed lands before execution sued, tho' he was seised in trust for the defendant at the time of the judgment, the lands cannot be taken in execution.

THIS was an action of ejectment on the demise of *Jacob Boardman*. The defendant pleaded Not guilty; and on a trial at the assizes in the county of *Essex*, before Mr. Justice *Tracy*, the case appeared to be this, (*viz.*) *Benjamin Stock* was seised in fee of the lands in question, and by indenture dated the 11th of *October* 1682. conveyed them in consideration of 1270*l.* to *Henry Sourby* and his heirs, who was only a trustee for *Peter Chamberlain* and *Anne* his wife, and their heirs, and by indenture dated the 11th of *December* 1682. between the said *Henry Sourby* of the one part, and the said *Peter Chamberlain* and *Anne* his wife, and *Hope Chamberlain* their son, of the other part, it was agreed, that *Henry Sourby* should stand seised of the premises, to the intent that *Peter Chamberlain* and *Anne* his wife should take 40*l.* a year for their lives, and that the rest of the profits should be paid to *Hope Chamberlain* and the heirs of his body.

In *Trinity* Term 7 *W.* 3. 1695. *Jam. Boardman*, the lessor of the plaintiff, being executor of *Jer. Boardman*, recovered a judgment against *Hope Chamberlain* for a debt of 160*l.* due on a bond from *Hope Chamberlain* to *Jer. Boardman*; on the 26th of *July* 1699. *Anne Chamberlain* and the said *Hope Chamberlain* borrow 600*l.* of the defendant *Coles*, and for a security for that sum the said *Hen. Sourby* by their direction mortgaged the premises to the said *Coles* for 500 years; *Trin.* 1714. the lessor of the plaintiff obtained judgment on a *Scire Facias*

HUNT v.
COLLS.

Facias upon the first judgment, and upon this took out execution by *Elegit*, and the sheriff, after an inquisition which found that *Hope Chamberlain* was seised in fee, extended one moiety and delivered it to the lessor of the plaintiff; and the doubt was, if he had any title by the statute 29 Car. 2. c. 3. (a) by which it is enacted, that after the 24th of June 1677. it shall be lawful for every sheriff, &c. to whom writs shall be directed, on judgment, &c. to deliver execution to the plaintiff of all such lands, &c. as any other person shall be seised of, &c. in trust for him against whom execution is sued, like as he might have done if the said defendant had been seised of such lands, of such estate as they be seised of in trust for him at the time of the said execution sued. And after argument by Sir *Constantine Phipps* and myself for the plaintiff, and Sir *Edward Northey* for the defendant, it was determined by Mr. Justice *Tracy*, that the execution was not good; for the words, *at the time of the said execution sued*, refer to the seisin of the trustee; and therefore if the trustee has conveyed the lands before execution sued, though he was seised in trust for the defendant at the time of the judgment, the lands cannot be taken in execution. And Sir *Edward Northey* said, that ever since the act such construction had been thought agreeable to the statute, though he did not know that it had ever been judicially determined. And a case was mentioned by Mr. Justice *Tracy* from Serjeant *Chebbire's* notes, where this opinion seemed to be allowed by Lord *Trevor*, and was not contradicted by the Court, *Johnson* vers. ———, in the Common Pleas. — *Anns.*

(a) Stat. 29 Car.
2. c. 3. l. 10.

3 Com. Dig. 306.

Term. Sanct. Mich.

2 Geo. I. In C. B.

Case 126.

Anonymous.

There must be a particular act shewn by which the plaintiff is interrupted, otherwise the breach of a condition for a quiet enjoyment, is not well assigned.

2 Vent. 139.
Supra p. 147.

THIS was an action upon a bond, with a condition, reciting, That whereas the obligor had purchased a copyhold tenement from the Dean and Chapter of if therefore, during the continuance of his right, estate and interest therein, he shall permit the obligee to have and enjoy a moiety of all the profits of the said tenement, then, &c. After *Oyer* the defendant pleaded the condition performed; to which the plaintiff replied *quod tēntum præd, unde præd* obligor was seised by grant for the term of his life, *fuit in possessione Johnson virtute dimission' ei fact' per præd oblig'*, & *quod* obligor did not permit him to have and enjoy the moiety of the profits according to the condition, *sed ipse recepit tot' reddit' tēnti præd' pro anno finit' ad Fest' Sancti Michaelis*. The defendant demurred to the replication, *quia duplex & caret formā*. And Serjeant *Pengelly* insisted that the replication was bad; first, because it did not appear that the tenement mentioned in the replication was the same tenement which is recited in the condition; in the condition there is no notice taken what estate or interest the obligor had purchased, but only said that the obligor had purchased a copyhold tenement; then when he says *tēntum unde præd* obligor was seised for life, *non constat* that it is the same tenement which is mentioned in the condition. Secondly, There is no good allegation of the demise to *Johnson*, for he alledges that *Johnson* was in possession *virtute dimission'*, and the *virtute* is not traversable,

verfable. Thirdly, The breach is double, for he fays that the obligor did not permit him to enjoy the moiety of the profits according to the words of the condition, and then he fhews that he received all the rent for fuch a year, which will be another breach.

ANONYMOUS.

To which it was answered by Serjeant *Braithwaite*, and refolved by the Court, that the replication here was good, for the recital *quod tēntum unde* he was feised for life, is only an inducement to the fubfequent matter, and not traverfable, for the defendant is concluded by the condition from faying that he had not fuch tenement, and if he had pleaded *Nul tiel Tenemen'* it would have been a bad plea; then it is immaterial to fay it was granted to him for life, for it had been fufficient to have faid *quod tēntum præd' fuit dimiff'* to fuch a one, and that the defendant had received all the rent.

Matter of inducement is not traverfable. Com. Dig. Tit. Pleader. (G. 14.) vol. 5. p. 118.

As to the breach it is well affigned; if it had been double that muft be fhewn particularly for caufe of demurrer, and in what point the duplicity confifts, and it fhall not be holden bad upon a general demurrer; but here the affignment of the breach is not double; for when he fays that the defendant did not permit him to enjoy the moiety of the rent according to the words of the condition, this would not have been fufficient without fhewing fome act done which amounts to a difturbance, and therefore it was neceffary for him to go further, and fhew that the defendant received all the rent, without which the breach would not have been complete; and fo it was refolved in *Frances's* cafe, 8 Co. (a) where it is agreed that there muft be a particular act fhewn by which the plaintiff was interrupted; otherwife the breach would not be well affigned. For thefe reafons Judgment was given for the plaintiff.

Duplicity not bad on a general demurrer. Supra p. 115.

(a) 8 Co.

Case 127.

Southgate *versus* Chaplin. In C. B.10 Mod. 383.
S. C.

A covenant to enjoy without disturbance generally, shall be construed a disturbance by legal title; but where a man covenants expressly against those who claim or pretend to have a right, the breach is well assigned tho' the disturber has no legal right.

3 Leon. 44.

Hob. 35.

Vaughan 119.

1 Roll. Abr. 430.

2 Com. Dig. 447.

567.

Vin. Abr. Tit.

Covenant. (Z.)

pl. 18. 26.

(L. 2.) pl. 71.

THIS was an action of debt upon a bond, with condition that the obligee should enjoy without interruption by any person having or claiming or pretending to have any right of common; the defendant pleaded the condition performed; the plaintiff assigned for breach, that he was interrupted by *Jer. Bye*, who claimed common in the close aforesaid *ut ad te'ntum suum de tempore cujus contr' memoria hom' non existit pertinen'*; and upon a demurrer it was urged by Serjeant *Brainthwaite* that here is not shewn by the replication any title to common in *Jer. Bye*, and the condition shall not be extended but to legal titles; and many cases were cited to this purpose. To which it was answered by Serjeant *Reynolds*, and resolved by the Court, that the covenant here extends by the express words to those who claim a particular interest, (*viz.*) in this land; and not only to those who have a right of common; for where a man covenants that another shall enjoy without disturbance generally, that shall be construed of a disturbance by legal title; for in other cases he has his legal remedy; but where a man covenants expressly, not only against those who have right, but against those who claim or pretend to a right (and the words here are *by any person having, claiming or pretending to have*) not a right in general, but common, which is a particular interest; and then the breach is assigned in the words of the covenant that he was interrupted by *Jer. Bye* who claimed common, *ut ad te'ntum præd' de tempore cujus, &c. pertinen'*, for here the obligee shews that the claim was not by any title subsequent to his title, but by a title which was time out of mind, &c. and whether the title be right or groundless, yet it was the intent of the parties that the obligor should indemnify the obligee against all claims of common.

Judgment was given for the plaintiff.

Prideaux *versus* Roberts. In C. B.

Case 128.

THIS was an action of debt upon a bond with condition for performing an award: and upon oyer demanded the condition was intire in these words, *Whereas the above-bounden J. P. (who was plaintiff) and the above-named J. P. had submitted themselves, &c.* The defendant pleaded no award made; upon which the plaintiff replied, and shewed the award, and assigned the breach; and the defendant demurred. And for the defendant it was insisted, that it did not appear that the defendant had submitted, for the submission is by the plaintiff only. To which Serjeant *Pengelly* answered, that it would be good notwithstanding this misrecital; for when he says *the above-bounden* (who was the defendant, and by the bond it appears that the defendant was bound) then the subsequent words *J. P.* which was the name of the plaintiff himself, shall be rejected as repugnant; for it would be sufficient to say, *whereas the above-bounden and the plaintiff had submitted themselves, &c.* as where a bond is upon condition, *that if the obligor pay such a sum, then the obligation shall stand in force*; these last words shall be rejected as repugnant to the intent of the parties, which was, that if the obligor paid, &c. the obligation should be void; and there the mistake was in reciting the condition of the counter-bond. The Court inquired if he could shew any authority for rejecting the name of the party in such a case; and because he could not it was adjourned. (1)

Whether words in the condition, which are repugnant to the plain intent of the parties, shall be rejected.
1 *Ld. Raym.* 38, 335.
Com. Dig. Tit. Obligation. (B. 3.) vol. 4. p. 279.
Dougl. 383.

(1) In the case of *Beche v. Proctor*. *Dougl.* p. 383. the Court held that a palpable mistake of a word should not defeat the true intention of the parties.—Lord *Holt* was of opinion in the

case of *Cromwell v. Grumden*. 1 *Ld. Raym.* 335. that insensible words, when the sense was compleat without them, should be rejected.

Case 129.

Yalden *versus* Hubburb. In C. B.

Judgment shall not be arrested after a verdict where intire damages are given, though part of the time was to come at the time of trial.

2 Ld. Raym. 1382. Vin. Abr. Tit. Damages. (R.) pl. 29.

[232]

(a) Raym. 200. S. C.

1 Lev. 299. S. C.

2 Keb. 693.

697. S. C.

Vin. Abr. Tit. Damages.

(Q.) pl. 19.

Supra p. 12.

THIS was an action upon the case for diverting a water-course on the 1st of *January*, 1 *Georgii*, and continuing it to *March* 1715. *per quod* the plaintiff lost the benefit of the water-course *abinde* till *Apr. tunc prox' sequen'*. And after a verdict for the plaintiff, Serjeant *Pengelly* moved in arrest of judgment, that intire damages were given, when part of the time was to come at the time of the trial; for as he alledges continuance till *March* 1715. which is not yet passed, and the damages are given for the time till *April prox' sequen'*, that is till *April* next, and so the jury in their giving damages had consideration of a time not passed at the time of their giving the verdict; and it was likened to the case of *Hamilton versus Vere*, 2 *Saund.* 169. (a) which was an action upon the case against an apprentice for relinquishing his service before the end of his term, *per quod servitium amisit per tot' resid' termini prad'*, when only two years of the five, for which he was bound, were past. And after a verdict judgment was arrested, for that damages were given for the loss of his service during the whole residue of a term, of which part was not then incurred. *Sed non allocatur*; for *per cur.* the time mentioned *March* 1715. not being then incurred, it was impossible; for at the time of the action it was not possible that the diversion of the water-course had continued till a time then not to come; and therefore when he alledges, that he lost the benefit of the water-course till *Apr' prox' sequen'*, that is also impossible, and therefore the jury could not have any consideration of it.

Judgment was given for the plaintiff.

Case 130.

Right *versus* Hammond & al'. In B. R.

There cannot be a remainder unless a particular estate is created at the same time upon which it is expectant. 1 *Str.* 427. S. C. 2 *Eq. Abr.* 311. pl. 17. 338. pl. 11. S. C. Vin. Abr. Tit. *Devise.* (L. 2.) pl. 32. (C. b.) pl. 12.

THIS was an action of Ejectment on the demise of *Bucknall* and his wife, *Horfeley* and his wife, *Colbourne* and his wife, and *Sarah Came*, against the defendant, for

RIGHT W.
HAMMOND.

some tenements in *Woolwich* in the county of *Kent*. And on the trial at the assizes in *Kent* before Lord Chief Justice *King*, the case was this :

Thomas Came being seised of the premises, by indentures dated the 3d and the 4th of *June* 1668. settled these tenements to the use of *Thomas Came* his son for life, remainder to *Mary* his wife for life, remainder to the right heirs of the son, and dies. *Thomas Came* the son by his will dated the 20th of *October* 1673. devises in these words, (*viz.*) " My lands by *Woolwich* my wife is to enjoy for her life, after " her death of right it goeth to my daughter *Elizabeth* " for ever, provided she hath heirs ; if my said daughter " should die before her mother, or without heirs, and my said " wife *Mary* should marry again, and have an heir male, I " bequeath him all my right to that estate, not thinking I " can sufficiently reward her love ; if my said wife marries " again, and fails of heirs male after her decease, and my " daughter she failing of heirs, I bequeath 50*l.* per annum of " that estate to my brother *Joseph Came*, and to his heirs ; " 20*l.* per annum to my sister *Sarah Madefson* and her heirs, " provided it come not into the hands of her husband ; 30*l.* " per annum more I bequeath to my brother *William Came* " and his heirs ; and the residue I leave to the disposal of my " brother *Joseph Came*."

[233]

Thomas Came the son died without issue male, having only one daughter *Elizabeth*, who died without issue, and the lessors of the plaintiff are heirs at law to her, (*viz.*) *Elizabeth*, *Mary*, *Katherine* and *Sarah*; the lessors are the co-heirs of *John Came*, brother of the said *Thomas Came*.

Mary, the wife of *Thomas Came* junior, after his death married *Thomas Hammond*, by whom she had issue the defendant.

A case was made for the consideration of the Judge, who afterwards sent it to the Court of King's Bench, where it was argued by myself for the plaintiff, and by Serjeant *Pengelly* for the defendant ; and afterwards by Mr. *Lutwyche* and Mr.

Reeve

RIGHT W.
HAMMOND.

Reeve for the plaintiff, and by Sir *Thomas Powis* and ———
for the defendant,

And for the plaintiff it was insisted, that the lessors of the plaintiff are the heirs at law to whom the estate belongs, if it is not disposed of otherwise by the will of *Thomas Came*.

That by this will nothing passed to the defendant; for he could not take but by way of remainder, or by way of executory devise (1); and he could not take by way of remainder, because nothing is devised to *Elizabeth* the daughter, for the will does not give her any estate but only recites the estate which she had before, for it says his wife shall enjoy for her life, and after her decease of right it goes to his daughter for ever, provided she have heirs, which is only a narration or recital of the estates as they were by the marriage settlement.

And afterwards judgment was given for the plaintiff upon the first point, that here was no devise to *Elizabeth*, and then the first son of the wife by her second husband could not take by way of remainder. And afterwards in another case between the same parties in Chancery, *Mich. 9 Geo.* for an estate in *Effex* which was purchased by *Thomas Came* in the name of trustees, pursuant to his marriage articles, and which was to be settled according to the limitations in the indentures dated the 4th of *June* 1668, and which after the death of *Thomas Came* 1675, upon a bill exhibited by *Mary* his wife and *Elizabeth* his daughter, was settled upon *Elizabeth* in

(1) The defendant in this case could not take by way of executory devise, because it was upon too remote a contingency, namely upon *Elizabeth's* dying without heirs 1 Str. 428. S.C. Supra p. 65. and the cases there cited—Neither could he take by way of remainder, because here was no particular estate to support it.—Lord Coke defines a remainder to be “a remnant of an estate in lands or tenements, expectant

on a particular estate, created together with the same at one time.” Co. Litt. 148. a. Fearn's C. R. 4th edit. 3. 2 Bl. Com. 164. considering the first part of the will then to have been a recital of the manner in which the estate was settled and not as a devise to *Elizabeth*, the defendant could not take for want of a particular estate being created at the same time with the remainder.

RIGHT W.
HAMMOND.

tail, and for default of such issue to *Mary* in tail; and it was now prayed upon the bill exhibited by the heirs at law of *Elizabeth*, that the estate in *Essex* should be conveyed to them, for the decree in 1675 directed the settlement to be pursuant to the will of *Thomas Came*; but according to the judgment of *B. R.* the will of *Thomas Came* did not alter the estate of *Elizabeth*, and therefore the settlement to *Elizabeth* in tail, and then to her mother in tail, was an irregular execution of the decree, and therefore the trustees ought to convey to the plaintiff. And the Master of the Rolls was of the same opinion, for he thought that *Elizabeth* did not take any estate by the will of *Thomas Came*, which did not make any devise or gift to her, but only recited that his wife was to enjoy it for her life, and that after her death of right it was to go (not that he gave it) to his daughter.

D E

Term. Sanct. Hil.

2 Geo. 1. In C. B.

Case 131.

Steward & ux' *vers.* Allen & ux'.

Words which do not directly charge the party with being a whore, are not such whereon the jurisdiction of the spiritual Court ought to be disallowed. 3 Raym. 103. 1 Roll. Rep. 420. 1 Roll. Abr. 66. pl. 13. 2 Gibb. Cod. 3025.

THE plaintiff prayed a prohibition to the Consistory Court of *London*, on a suit there for defamation; and the suggestion charged, that there was a libel against the defendant in the Spiritual Court, for that the wife of the defendant said of the wife of the plaintiff, *That she picked up a man in Fleet-street and carried him home, and carried him up stairs into her bedchamber, where he threw her down on the bed and put his finger super ejus secreta, &c.* And the custom of *London* was alledged, by which a whore was to be carted; and therefore when there is a libel for calling a woman a *whore*, a prohibition will be granted; and the words in this libel are tantamount, and therefore it was prayed here. *Sed non allocatur*; for words which do not directly charge the party with being a whore, are not such whereon the jurisdiction of the Spiritual Court ought to be disallowed; and therefore a prohibition was denied.

(a) 2 Lutw. 2039.

8 Mod. 124.
4 Com. Dig. 509.

And the authority of the case in *Lut.* (a) — *Houblon ver. Millner* was much relied on; and though the Chief Justice mentioned a case in the King's Bench, where a prohibition was granted upon a libel for words which did not directly charge the party with being a whore by express words, and that the case in *Lut.* — was there cited; yet it appeared that case was not much considered, and therefore upon the authority in *Lut.* — the prohibition was now denied.

Lutham *vers.* Jarrett.

Case 132.

THIS was an action upon the case upon an *Indebitatus assumpsit*. After a writ of inquiry excuted, Serjeant Hall moved that the writ of inquiry should not be filed; for when the plaintiff declares *Quod cum ipse prad' Johannes Jarrett indebitat' fuisset eidem Thome Lutham pro diversis operib' & laborib' ipsis Johannis in & circa ejus negotia ad special' instant' & requisition' ipsius Johannis per ipsum Thomam ante tunc fact' & performat'*, here appears no consideration for the promise of the defendant, for it is said, that he was indebted *pro operib' & laborib' ipsis Johannis*, and the work and labour of the defendant himself was not any consideration upon which a promise could arise or enure to the plaintiff. And upon this a rule was obtained *nisi, &c.*

Opus & Labor
may signify business or task,
as well as work
and labour.

And I now insisted, that taking all the words together there appeared a sufficient consideration; for if the construction now put upon the words prevails, then the words (*per ipsum Thomam ante tunc fact' & performat', &c.*) must be rejected; for it is impossible that the work and labour done by the defendant (if the words are understood in that manner) could be performed by the plaintiff; but *pro operib'* does not signify only for the work, but the business also; and that is a signification well known and allowed; if it be understood in that sense, then all the words may well stand; for then the declaration is, that the defendant was indebted to the plaintiff *pro diversis operib'*, (*viz.*) for several businesses of the defendant *circa ejus negotia*, and at his request performed by the plaintiff; and the Court was of that opinion, and the first rule was discharged. As to the word *Laborib'*, that might be either rejected; or it may signify also work or enterprise, as well as labour.

Cafe 133. John Earl of Clanrickard *vers.* Bourk & al.
In the House of Lords.

A person restored after an attainder for high treason, shall have the same equitable interest in every part of his estate, as he had before the attainder.
2 Bro. P. C. 26. S. C.

William late Earl of *Clanrickard* was seised in fee of the barony of *Dunkelling*, and other manors and lands in the kingdom of *Ireland*, subject to a debt of 20,000 *l.* and to other debts to the value of 10,000 *l.*; and being so seised upon his marriage with *Ellen*, now Countess Dowager of *Clanrickard*, made a settlement of the said barony, manors and lands on her for her jointure, remainder to the heirs male of the family; and afterwards died without issue, and without having satisfied the incumbrances charged on the jointure. Afterwards, upon a reference by the parties interested in the debts and the estate, it was agreed, that the Countess should have 900 *l. per annum*, Earl *Richard*, who was the heir male, 700 *l. per annum*, and that the residue of the profits should be applied to pay the debts; and after debts and incumbrances satisfied the Countess should have 1500 *l. per annum*. In the reign of King *William* the persons in remainder became attainted for high treason, and by the statute 11 & 12 *W.* 3. (a) all estates forfeited, &c. in *Ireland* were vested in trustees for the benefit of the Public.

After this statute the Countess claimed her jointure before the trustees, and her claim was allowed; and the creditors, who had incumbrances on the jointure-estate, made their claims for their respective debts, which were also allowed.

(b) 1 Ann. stat. 2. c. 21.

By the statute 1 *Anna*, (b) — *John* Earl of *Clanrickard* was restored to his honour and estate in the same manner as if he had not been attainted. Then a bill was exhibited in the Court of Chancery in *Ireland*, to be quieted in the possession of such part of the estate as was allowed to him by the award. To which the defendant pleaded the statute 11 & 12 *W.* 3. and the claim allowed to the jointress of the estate limited to her in jointure, in bar to the demand by the award; and the plea

plea was allowed with costs. From which decree the Earl appealed to the House of Lords here.

CLANRICK-
AND W. BOURKE.

And I insisted, that by allowance of the jointress's claim by the trustees all equitable demands upon the jointure were consequently allowed and revived, though no express claim was made of them. If the jointress had made a mortgage of the estate limited to her for her jointure, or had agreed to grant a lease of part of the lands, the mortgagee or lessee, or the person with whom such agreement had been made, need not claim their interest, but by the allowance of the jointress's claim their demands of her would be revived; and the case would be the same where incumbrances made before the jointure affect the estate limited in jointure, and an agreement is made touching the manner in which those incumbrances shall be satisfied.

When the claim was allowed, the claimant was to enjoy her jointure as against the public, but not as against those who had any claim or title paramount; and the decree of the trustees says, that the claimant shall have her jointure-estate according to the intent of the settlement in 1676. by which the jointure was settled, and by that settlement it was subject to the payment of debts; and therefore the decree is tantamount to saying, that she shall enjoy it subject to her proportion of the incumbrances; which proportion was fixed and ascertained by the award.

And the statute (a) 1 Anna, — does not vary the case; for the appellant does not take his estate as a purchaser under that statute, but he is restored to it in his ancient right, as if he had never been attainted, and so are the express words of the statute; and therefore he shall have the same benefit and advantage as if he had never been attainted.

(a) 1 Ann. Stat.
2. C. 21.

But by the statute of 1 Anna, a proviso is added, that all adjudication and decrees of the trustees are confirmed in the same manner as if the said act had never been made; but this proviso does not give those decrees any validity which they had not before, but only puts them in the same plight and con-

CLANRICK-
ARDU BOWER.

dition as they were upon the statute 11 & 12 W. 3. and therefore every body shall have the same advantage upon the estate allowed by any claim, as they might have had by the said act 11 & 12 W. 3.

And this is *so a fortiori*, because no claim could have been made for the benefit of the award, which does not give any of the parties an interest out of the estate, but only apportions and ascertains the payment of debts to which the estate was subject before.

For these reasons the decree in *Ireland* was reversed, and the appellant was allowed the benefit of the award.

D R

Term. Sanct. Trin.

2 Geo. I. In B. R.

The King *vers.* Osborn.

Case 134.

AN information in the nature of a *Quo Warranto* was prayed against the defendant, who claimed to be Mayor of the Borough and Port of *Hythe* in the county of *Kent*; and upon the Affidavits, the case appeared to be this: the usual day for the election of a mayor of this borough and port is the 2nd of *February*, and upon the 2nd of *February* last a Court was assembled by *Stokes* the late Mayor for that purpose. At the first meeting the orders of the last Court were read, by which it was ordered, that one *Lake* should be admitted to his freedom of the said borough, paying 50*s.* for his fine, and *Lake* being then present paid the 50*s.* and was admitted a freeman of the said borough; the right to the freedom of the said borough was either by birth, service, marriage, or redemption, (*viz.*) The son of a freeman born since the admission of his father within the borough, and being of full age, and being inhabitant and resident within the borough, has a right to the freedom. So whoever married the daughter of a freeman, born within the borough since the admission of her father to his freedom, being of full age, and inhabitant and resident within the borough. So whoever had served an apprenticeship to a freeman, and whoever had been allowed by the corporation to be admitted to their freedom upon a fine. These being the titles to the freedom of the borough, after the or-

An information shall go against the Mayor, where persons, intitled to their freedom and demanding admittance, are refused.

REX v.
OSBORN.

ders read, and *Lake* admitted to his freedom according to the custom, *Stokes* laid down his staff, and then a horn was sounded to summons the freemen to the election of a new Mayor ; upon which all who were before admitted to their freedom came, and six others who were not admitted but who claimed title to be admitted either by birth or marriage, came and prayed to be admitted ; upon which *Stokes* informed them that they came irregularly, and that there should be no admission that day. Upon which they declared their votes for one *Auflin*, and then departed.

The others proceeded to an election, and upon the poll *Osborn* had 24 votes and *Auflin* 20 ; so that *Osborn* had the majority of votes admitted to their freedom, and *Auflin* the majority, if the votes of those six, who demanded their freedom and were refused, were good.

And upon the opinion of *Parker C. J. Powis* and *Pratt*, an information was directed against *Osborn*, for that if the six were intitled to their freedoms, and demanded and were refused, all that could be done on their part was performed, and they ought not to be deprived of their votes by the tort of the mayor who would not admit them. But *J. Eyre, e contra*, for by such a construction all *Mandamus's* for their admission would be superfluous, and though they have by birth or marriage a qualification to be admitted to their freedom, yet no right to it is vested in them till their admission, and till they have performed all that a freeman ought to perform to complete his freedom.

4 Co. 23. b.
(a) Yelv. 145.
4 Co. 22. b.

And therefore it is not like the case of an (1) heir of a copyhold upon whom a copyhold descends, and who may maintain an ejectment and make surrender before (a) admittance.

But by the three other Justices the information was granted ; but *Parker Ch. J.* thought that if there had not been a direct refusal, it would have been otherwise.

(1) He may also make leases. Moore. before the admittance of his lessor. 1
597. pl. 813. 2 Com. Dig. 493. And Leon. 100.
the lessee may maintain an ejectment

Afterwards

Afterwards in the same term according to a proposal of the Court, and by the consent of the parties, feigned issues were directed to try if these six or any of them, were intitled to their freedom, and whether *Austin* or *Osborn* was duly elected, and proceedings upon the information were staid till the trial of these issues. *Vide Infra* p. 243.

R. x w.
OSBORN.

[242]

Daw *vers.* Newborough. In C. B.

Case 135.

IN an action of ejectment upon a special verdict found at the assizes before Baron *Price*, the case appeared to be this: The Dean and Chapter of *Bristol* were seised of the rectory of *R.* and granted a lease to *J. C.* for three lives, the lessee by lease and release conveys to his eldest son *Thomas* and his heirs, in consideration of natural love and affection, and for divers others good causes and considerations, to the use of the said *Thomas* for life, then to the use of the heirs male of his body, and in default of such issue to the use of his son *Joseph* for life, remainder to his heirs male, and in default of such issue to the use of the lessor of the plaintiff.

A conveyance cannot operate by way of Covenant to stand seised, where the intent of the party who conveys appears to be contrary to such a construction.

The lessee had issue *Thomas* and *Joseph*; *Thomas* had issue *Mary* who was married to the defendant, and died without issue male; *Joseph* died without issue male; by which means the lessor of the plaintiff claims; and if this was a good conveyance to the lessor of the plaintiff by way of covenant to stand seised was the question.

And Serjeant *Pengelly* argued that this conveyance operated as a covenant to stand seised; and that the exility of the estate of the lessee, who was only tenant for three lives, did not obstruct the title of the lessor of the plaintiff.

And afterwards in *Trinity* term 3 *Geo.* the Court gave judgment, that this did not operate by way of covenant to stand seised. And *King* Ch. J. delivered the reasons of that judgment, that a conveyance cannot operate by way of covenant to stand seised, where the intent of the party who conveys appears to be contrary to such a construction, for the intention

2 Bl. Com. 331.

DAW V.
NEWBOROUGH.

No use can be limited on an use. 1 Co. 136. b. 1 Leon. 6. 148. Poph. 81. 2 Bl. Com. 335. Carth. 273. 1 Atk. 591. Dyer 155. b. An use is an authority to take the profits. 2 Leon. 15. 1 And. 318. Co. Lit. 272. b.

1 Hale. P. C. 248. 2 Bl. Com. 336. Vaugh. 50. 1 Atk. 591.

Sand. on Use and Trusts. 231.

of the party is essential to the direction of the uses. But here the intent of *J. C.* appears to be, that the estates which he limits by way of use should arise out of the estate limited to *Thomas* and his heirs, and then they can never enure by way of covenant out of the estate of the covenantor; and to this purpose are the resolutions in *Cro. Eliz.* 401. 1 *Sid.* 82. 2 *Vent.* 318. And when the estate is limited to *Thomas* and his heirs, to the use of, &c. the use must of necessity arise out of the estate of the feoffee, &c. to the use, &c. and therefore if it be to the use of *Thomas* and his heirs, and afterwards to the use of others, this will be an use upon an use which will never be allowed by the rules of law; for the use is only a liberty or authority to take the profits, but two cannot severally take the profits of the same land, therefore there cannot be an use upon an use.

But this is now allowed by way of trust in a Court of Equity.

Case 136.

Austin *vers.* Osborn.

Vide supra p. 240. Where persons have a right to their freedom, the tortious refusal of the Mayor does not make their votes void, for admission is but a ceremony.

IN an action upon the case, the plaintiff declared on a feigned issue directed by the Court of King's Bench, and the issue was, whether the plaintiff or defendant was duly elected mayor of the port and borough of *Hythe*, one of the Cinque Ports in the county of *Kent*; and upon the trial at the assises at *Maidstone* in *July* 1716, before the Lord Chief Justice *Parker*, the case appeared to be this: By the Charter granted to the corporation of *Hythe* on the 14th of *March* in the 17th of *Eliz.* the election of the Mayor is to be on the 2nd of *February* annually, & *si aliquis Major obierit ante finem anni, proximo die post notitiam, &c.* a new Mayor shall be elected for the residue of the year. On the 9th of *August* 1715 Mr. *Deeds* then Mayor died, & *eodem die circiter undecimam horam* the horn was blown, which was the usual notice of summoning the Court, and the officer was also sent to summon all the burgesses of the corporation; upon which 20 were assembled, and elected *Stokes* mayor for the remainder of the said year.

Upon

AUSTIN v.
OSBORN.

Upon the 2nd of *February* next ensuing, when the annual election of the Mayor was appointed by the Charter, *Osborn* and *Austin* were candidates and the election was to be *per jurat' & communital'*.

After the Court was assembled, one *Lake* (who at a former Court had been ordered to be admitted to his freedom upon the paying a fine of 50 s.) paid his fine and was sworn in a freeman, and took the oaths of allegiance and supremacy, and then the other officers of the corporation were continued and sworn in, and then *Stokes* the Mayor said that he would proceed to the election of a new Mayor. Some persons present said that there were others who would take up their freedom; to which *Stokes* replied, that he would not do any business that day except electing a new Mayor, and then laid down his mace, and the horn was blown to summons the freemen to the election of a mayor.

Then *Tournay*, *Brockman*, *Geo. Kennet*, *Rich. Kennet*, *Symonds* and *Rand*, who claimed a right to be admitted to the freedom of the port and borough of *Hytbe*, entered the Court and demanded their freedom, and tendered 15 d. which was the usual fine paid for admittance, and prayed to be admitted, but *Stokes* refused them; upon which those six persons declared their votes for *Austin*, and were excluded the Court.

The right to the freedom was by birth, by marriage and by fine; and it was allowed that *Geo. Kennet* had a right to his freedom, and though the right of the others was controverted, yet by a verdict found the same day upon a feigned issue in another action it was found that they all had a right to their freedom.

After excluding those six from the Court, they proceeded to the election of a Mayor, and there were 24 votes for the defendant *Osborn*, and 20 for the plaintiff *Austin*, besides those six who were excluded, so that if those six were good votes *Austin* was elected, otherwise *Osborn* was elected, and afterwards it was consented that a case should be made, and this matter argued; the Chief Justice delivered his opinion, that

AUSTIN W.
OSBORN.

those six ought to be reckoned as good votes for *Austin* and that he was duly elected.

And the Chief Justice said that it was not improper to take notice how *Stokes* became Mayor; for the questions here are whether there does not appear in this case such a partiality as to make the election of the defendant void?

Secondly, if the votes of the six ought not to be allowed, by which the election of the plaintiff would be good?

As to the first matter, the election of *Stokes* was not made pursuant to the direction of the Charter, and though his election was not void, yet his being elected in such a manner, shews the intention of continuing the office in one party.

As to the other, the six votes excluded ought to be allowed; for it does not appear that there was any doubt of their right to be admitted freemen, but it appears that they were intitled to their freedom; and there did not appear to be any doubt of it on the 2nd of *February*, for the Mayor does not give that as a ground for refusing them, but said that he would do no more business that day; then if they had a right to their freedom, and the Court had no doubt of it, if they had done all that was in their power in order to be admitted, the tortious refusal of the Mayor does not make their votes void, for admittance is only a ceremony introduced and used for more order and regularity.

The case of a tender and refusal, which amounts to payment, is very apposite to this matter.

If a copyholder, to whose use a surrender is made, prays to be admitted in Court and is refused, he shall be tertenant against the Lord, tho' the Lord does lose his fine.

[246]
Lit. &c. 421.
2 Bl. Com. 316.

If a man approaches as near as he can to the lands, this amounts to a livery.

And

And the case here is stronger, for it appears that the corporation had at that time power to perform the ceremony, and there can be no reason why they did not perform it.

AUSTIN &
OSBORN.

This is not properly to be considered as between the plaintiff and defendant, but between the persons excluded and the corporation, and then what cause can there be for refusing their votes till admittance ?

On the part of the corporation nothing but matter of decency ; on the other part it would be manifest injustice if their votes should be rejected ; and where the competition is between a defect in point of decency on the one part, and manifest injustice on the other, there can be no question which ought to prevail.

But the Chief Justice, after declaring his opinion, said he would not preclude the defendant from taking the opinion of the Court, and therefore as he was of such opinion he could not in justice permit the defendant to continue in his office, yet he would order that, if upon motion by the defendant in Court the first week of the term the Court should be of a contrary opinion, the *insignia* of the office which were now by rule delivered to the plaintiff should be re-delivered to the defendant ; and a rule was made accordingly.

This matter was touched on in Court upon a motion for an information, *Trin. 2 Geo.* and then Chief Justice *Parker*, Justice *Pratt* and Justice *Powis*, were of the same opinion which the Chief Justice now delivered, but Judge *Eyre* was of a contrary opinion.

In *Michaelmas* term 3 *Geo.* the possession of the office and *insignia* of Mayor being resigned to the plaintiff according to the rule, and the Court in *Trin.* term being of the same opinion with the Chief Justice, the defendant would not be at the charge of arguing this point, but submitted, that judgment should be given against him ; and upon such submission the Chief Justice said, that the matter was worthy of being argued ; and he should be satisfied to have it argued ; but he had

AUSTIN v.
GILBORN.

had considered the case, and was of the same opinion now as he was at the assizes.

Case 137.

Loveday *vers.* Solomon Mitchell. In C. B.

When the defendant in replevin makes conveyance, and avows that the property is in himself, it seems to be sufficient without a traverse.

Vin. Abr. Tit. *Avowry*. (C. a.) pl. 9. (D. a.) pl. 10.

THIS was an action of Replevin. The defendant avows the taking of the goods as the goods *ipſius Solomonis*, and concludes with *petit judicium & return*, &c. To which the plaintiff demurred, and shewed for cause, that the defendant did not traverse the property of the plaintiff. And Serjeant *Chefbire* urged, that he ought to make such traverse; for when the plaintiff had alledged a property in himself, if the defendant afterwards alleges property in himself, or in a stranger, this denies the property of the plaintiff only by inference and argument; but he ought to deny the plaintiff's property in direct terms, and so are all the precedents; with this difference, that in some cases the defendant alleges property in himself or another, with a direct traverse; and in some cases the plea is, that the property is in the defendant, and not in the plaintiff, which is tantamount to a traverse; for the words *& non* make a traverse. 1 *Sand.* (a) Serjeant *Selby* replied, that the precedents were both ways. *Hern's Plead.* 4. 1 *Brown's Ent.* (b) — (c) *Pl. Gen.* — 1 *Mod. Int.* 300. And *per Cur'*. It will be good both ways, and there seems to be no difference; for the defendant might have pleaded property in abatement or in bar, and it would have been good without a traverse, and upon that issue should have been joined. And therefore when the defendant makes cognizance, or avows that the property is in the defendant, it seems to be sufficient; for the defendant cannot conclude to the country, but the plaintiff ought to reply, and upon that replication issue shall be joined, and the property of the plaintiff must be proved.

(a) 1 *Sand.* 22.
1 *Lev.* 192. S. C.
2 *Keb.* 94. 105.
S. C. 5 Com.
Dig. p. 109.
(b) 1 *Brown's Ent.* 310.
A defendant may plead property either in bar or in abatement.

Cro. Jac. 519.
3 *Keb.* 232.
1 *Ver.* 249.
S. C.
2 *Lev.* 92. S. C.
6 *Mod.* 81.
1 *Salk.* 5. S. C.
Holt. 562. S. C.
2 *Ld. Raym.*
984. S. C.
Carth. 244.

Gillb. Replev. 2d, edit. p. 127. *infra* p. 592. (c) *Plac. Gen.* 602.

Anonymous. In C. B.

Case 138.

THE *Poslea* returned said, that seven jurors of the principal pannel appeared, and five *tales* were added, and then *quod jurator simul cum aliis de circumstan' jurat' ex assensu partium & per mandat' justiciar' jur' prad' a veredicto super exit' prad' dand' certis de causis exonerent' & Alexander Saunders ulimus jur' prad' retrahet'*. Afterwards there was a *Disfringas* with *Decem Tales* for the same jury at the next assizes, and at the next assizes the issue was tried by the same jury.

If the jury is discharged at the assizes for a view, there is no need of a *Ventre facias de novo*.
1 Str. 70. S. C.

And it was moved in arrest of judgment, that here was a mis-trial, for there ought to have been a *Venire fac' de novo*, and not a *Disfringas* with *Decem Tales* for the same jury; for by the statute (a) 7 & 8 W. 3. there shall be a *Venire de novo*, unless in cases of a view.

(a) St. 7 & 8
Will. 3. c. 32.

Secondly, The jury here were totally discharged, and then there must be a *Venire fac' de novo*; for the words are express, that the whole jury shall be discharged, and the subsequent words *quod ul' jur' retrahetur*, are impossible, for all were before discharged, and then none of them could be afterwards brought back again.

Thirdly, The entry is upon the latter *Poslea*, where *Abraham Saunders* is mentioned, not *Alexander Saunders*, and so one was withdrawn who was never sworn.

For which Serjeant *Cheshire* answered, that the cause was sent to a view, and therefore was within the words of the statute.

And tho' the entry be *Quod certis de causis* the jury was discharged, and it does not appear by the entry that this was intended for a view; yet this may be explained to the satisfaction of the Court, and need not be mentioned in the entry; for the entry is in the same manner as the entry was before the

statute;

ANONYMOUS.

statute ; for it is sufficient to say, *Quod certis de causis exonerent*, without mentioning what cause ; but here by the *Ven' fac'* it appears, that a view was intended at first, for the *Venire* says *Quod habeat jur'* (*quod sex vel plur' habeant visum*) by which it appears, that this *Ven' fac'* was agreeable to the statute of 4 & 5 Anne, c. 16. which allows a view before trial ; but because only two of the jurors had viewed the premisses, as appears by the return of the sheriff upon the *Venire fac'* ; it was agreed, that the cause should be sent to a view, as appears by the rule of assize, now made a rule of Court. This then being the reason of the withdrawing a juror ; and the discharge of the others will be within the stat. 7 & 8 W. 3. which allows a *Disfringas* with *decem Tales* in cases of view ; and then the entry here *Quod ult' jur' retrahetur* shall be transposed, and placed before the words which discharge the jury. And *per Cur'*, If issue is joined, and at the assizes when the issue comes to be tried, and a view is consented to, and one juror withdrawn, and the others discharged, for that reason, by the statute 7 & 8 W. 3. there need not be a *Venire fac' de novo*, but it is sufficient to have a *Disfringas* for the same jury with *Decem Tales* at the next assizes. Then when the statute 4 & 5 Anne, c. 16. allows a view before trial, and directs a *Venire fac'* for that purpose, and there be no view had, there may be a view afterwards by consent at the assizes ; and if the jury is discharged for that reason, there is no need of a *Ven' fac' de novo*. But it is proper that the entry upon the roll should be, that the jury was dismissed for that reason ; and as the usage has been otherwise since the statute, that may excuse the omission here ; yet the Court ordered, that for the time to come such entry should be made.

As to the other objection, the Court thought the words should be transposed, and construed that a juror was withdrawn, and the rest of the jury dismissed ; for if they were all discharged at first, it would be impossible that any of them should be withdrawn afterwards : and for these reasons the exceptions were disallowed by the Court.

Johannes Abrahāt *versus* Johannem Bunn. Case 139.
In C. B.

THIS was an action of debt upon a bond, with condition that the defendant should pay 50*l.* to one *Eyres* on such a day, and should indemnify the plaintiff, who was bound with the defendant in another bond to *Eyres* for the payment of the same sum.

A mistake of the plaintiff's name instead of the defendant's is amendable after verdict without defence.

Vin. Abr. Tit. Amendment. (P)

pl. 1 Cro. Elis. 435. 752. 904. Cro. Jac. 67. Yelv. 65. S. C. 1 Brownl. 87. S. C. 1 Str. 551. 8 Cui. 161. d. Palm. 524. Skin. 591. 1 Term Rep. 783. 1 Com. Dig. 329. 331. 337. 1 Bac. Abr. 104. — Infra p. 377. 557.

The defendant pleaded *Solvit ad diem*. The plaintiff replied *Quod præd. Johannes Bunn non solvit prout idem Johannes Bunn superius allegavit, & hoc petit quod inquirat per patriam, & præd. Johannes Abrahāt similiter*, where it should have been *præd. Johannes Bunn similiter*. After a verdict for the plaintiff, without any defence made by the defendant upon whom the issue lay, it was moved in arrest of judgment by Serjeant *Selby*, that they relied on that misprision, and therefore made no defence; and that the statute 17 Car. 2. c. 8. does not extend to this case, for that aids a mistake of the name where the plaintiff or defendant has been rightly named before, only where that might be shewn for cause on a demurrer; but that could not be done here. To which the Court agreed.

But it was amendable by (1) 8 H. 6. (a) — and 32 H. 8. (b.) — and for that was cited 1 Rol. Abr. 199. pl. 27. 2 Cro. 502. 587. And of that opinion was the Court, and it was amended,

(a) Stat. 8 Hen. 6. c. 12. confirmed by Stat. 8 Hen. 6. c. 15. (b) Stat. 32 Hen. 8. c. 30.

(1) The statute 8 Hen. 6. enlarges only the subject matter of the statute 14 Edw. 3. cap. 6. 1 Salk. 51. 1 Com. Dig. 315. The statutes of 8

Hen. 6. and 14 Edw. 3. are the only statutes of Amendments, the others are statutes of Jeofails. 1 Salk. 51.

Case 140. Piggott *vers.* Sir Henry Penrice & Ux'.
In Canc'.

The same circumstances ought to be proven to be performed to make a good re-

vocation in equity as at law, unless prevented by the person interested. 1 Eq. Abr. 209. pl. 11. S. C. Ch. Prec. 471. S. C. Gilb. Rep. 137. S. C. 9 Mod. 15. Pow. on Powers. 157. 2 Vern. 69. 2 Eq. Abr. 673. pl. 8. S. C. 2 Freem. 102. S. C.

UPON a bill brought for an account of the real and personal estate of ——. The case appeared to be this:

[251]

Sir *John Spencer* died without issue and intestate, by which means his estate descended to his four sisters, *Elizabeth Gore* (mother of the defendant's wife, which *Elizabeth* was dead, and the defendant's wife her heir) *Susanna Nelson*, *Anne Meredith* and *Alice Piggott*, wife of the now plaintiff. After the death of Sir *John Spencer*, viz. on the 9th of *February* 1712. *Susan Nelson* made and duly executed her will in the presence of three witnesses, and thereby devised in these words, *I make my Niece executrix of all my goods, lands and chattels*, and died; after her death the plaintiff and *Alice* his wife being seised of one fourth part as parcener, of a third part of *S. Nelson's* share as co-heir to her, (for the sisters *Anne* and *Alice*, and the wife of the defendant, being the daughter of *Elizabeth Gore*, the other sister, were co-heirs to *S. Nelson*, if no estate passed by her will,) levied a fine of the third part of the manor, &c. which was the estate of Sir *John Spencer*, and by deed declared the uses to the plaintiff and his wife for their lives, remainder to the right heirs of the plaintiff, with a proviso, that the plaintiff and his wife, or the wife alone notwithstanding her coverture, by deed or writing attested by three witnesses, not being menial servants, might revoke the uses of the inheritance after the life of the plaintiff, and limit new uses. Afterwards *Alice Piggott* being sick wrote a letter, dated the 24th of *January* 1713, to Mr. *Edwards*, who prepared the settlement according to the fine, and desired that he would prepare a deed with speed; that since she had a power of revocation, and was unwilling that the first deed should be

Piggott v.
PENRICE.

be made as it was, and used arguments against it, and was dissatisfied in conscience about it, there might be an alteration, till when she should not die satisfied; for we all know my sister *Nelson's* meaning, and I give the inheritance of that part to my Niece Gore, who was the daughter of my eldest sister; and on the back indorses that he should keep it secret.

This letter was sent to Mrs. *Meredith*, with a desire that she would read it, then seal it up; and then it was delivered to Mr. *Edwards*. About the end of *January* Mr. *Edwards* communicated the contents to the plaintiff, and in the beginning of *February* sent a letter to Mrs. *Piggott*, by which he desired to know, whether she would have the estate limited to her niece and her heirs; if she should die without issue, or under age, if she would not in that case augment her charities, (for by the letter she said also, that she would leave 20*l.* per annum to augment the poor Living of *Offley*, and 10*l.* per annum for the poor apprentices. On the 26th of *February*, Mr. *Edwards* wrote another letter to Mrs. *Piggott*, to let her know that the deeds were prepared for the charities, and desired to know who should be the trustees. On the 10th of *March*, Mrs. *Piggott* died, and Mr. *Edwards* in his examination deposed, that when he acquainted Mr. *Piggott* with the contents of the letter which he received from his wife, Mr. *Piggott* did not, as he knows, propose any method, or use any means to hinder any revocation or new deed of settlement; and that he received no other orders, and no answer to either of his letters,

[252]

It was now insisted upon, that the words, *I make my Niece executrix of my goods, lands and chattels*, amounted to a devise of the lands to her, for otherwise the word *lands* would have no signification, for the testatrix was possessed of no leases; and it was urged, that her intention appeared by her declaration to the witnesses, to whom she said, that if she had never so much, the whole should go to her niece, and that Mrs. *Piggott* and Mrs. *Meredith* should not be a Groat the better for what she left; and this was confirmed by Mrs. *Piggott's* letter; and though parol declarations shall not be allowed

Piggott v.
PENANCE.

to enlarge the words of a will, yet they may explain words which are otherwise ambiguous. But on the other side it was insisted, that no intention here appeared further than to make her niece executrix; and an heir shall not be disinherited but by express words. That the addition of *goods, lands and chattels*, is only an enumeration of the particulars which she shall have as executrix; and the word *lands*, being inserted among personal things, shall be construed only of things which she could take as executrix; as in the case of *Wilkinson versus Merryland*, (a). *Cro. Car.* 447, 449. And if the testatrix had no leases, yet she might intend to have some; or if not, the import of the word be may, that she should have the rents and emblements of the land; as where there is a *Levari fac' de terris & catallis*, the sheriff may take the corn upon the ground and other chattels; and a parol declaration shall never be allowed in the exposition of a will.

(a) 1 Jones 380.
S. C.
2 Roll. Abr. 700.
Pl. 15.
3 Eq. Abr. 178.
Pl. 19.
Infra p. 339.

Supra p. 52.

[253]

And of this opinion was the Master of the Rolls, but would have allowed a trial at law if Mr. *Couper* and Mr. *Vernon* would desire it, but they did not.

It was then insisted, that this letter of Mrs. *Piggott* amounted to a revocation in equity, for it shewed her intention that there should be a revocation, which seems to have been obstructed by the plaintiff; for Mr. *Edwards* was his agent, and was desired by the letter to be secret; afterwards he communicates it to the plaintiff, and though he deposes that he doth not know that Mr. *Piggott* did propose any method or use any means to hinder, &c. yet the manner of penning his deposition is suspicious; and when he was desired to prepare a deed for the revocation with speed, he did nothing, nor wrote any answer till *February*, and then desired to know if the estate should be to the defendant and her heirs, when the letter had mentioned that the inheritance should be settled on her niece; and it does not appear whether his letter ever came to Mrs. *Piggott*; but the delay seems to be affected, and Mr. *Piggott* must necessarily be supposed to have been the cause of it. But the Master of the Rolls would not allow this to be a revocation.

tion, for there was no proof that Mr. *Piggott* hindered the execution of the revocation if his wife would execute it, but at the same time he declared that Mr. *Edwards* was culpable; and if it had been proved that Mr. *Piggott* had hindered any body from coming to his wife, or prevented the execution, or obstructed the ingrossing of the deed of revocation, he would have allowed it as a good revocation against him; but this not being proved, the same circumstances ought to be proved to be performed to make it a good revocation in equity, as were requisite to make it a revocation at law, for if all the circumstances of the power are not pursued, it will not be a good revocation in equity or at law; and so it was resolved in the case of (a) *Bath* and *Mountague*.

PIGGOTT v.
PENRICE.

(a) 3 Ch. Cal. 59.
2 Ch. Rep. 417.

Afterwards, on the 19th of *May* in *Easter* term following, this cause was heard before Lord Chancellor *Cowper* upon an appeal, and the former decree affirmed. As to the devise in these words, viz. *I make my Niece executrix of my goods, lands and chattels*, he thought there was no ground in any Court to construe that a devise of the land, or to subject land to the payment of debts; for the will begins with an expression improper for the devise of lands, (viz.) *I make my Niece executrix*, which has nothing to do but with the personal estate; then when she adds of *all my goods, lands and chattels*, that is only an enumeration of the particulars which she shall take as executrix. And the term *lands* is not insignificant, for it imports that she shall take the rents of the lands, but does not amount to a devise of the inheritance of the land, for the law will not permit an heir to be disinherited by implication.

[254]

Vin. Abr. Tit.
Devise (l. a.)
pl. 14.
2 Ack. 450.
1 Roll. Abr. 613.
Cowp. 303.
Pow. on Dev.
398.

Supra p. 168.

As to the revocation, the letter does not amount to that, for though perhaps her intention was to favour her Niece, and there was a delay or neglect in the Agent Mr. *Edwards*, with a design to favour his friend Mr. *Piggott*, yet this endeavour of hers without any thing done in pursuance of it, and without pursuing the circumstances of the power, will not amount to a revocation; when a person confines his power to particular

Piggott v.
Pence.

circumstances, it is done with a design to prevent his being surprised.

Vin. Abr. Tit.
Power (H) pl. 1.
10 Mod. 473.

If a deed of revocation had been prepared and ready to have been executed, but three witnesses who were not menial servants could not have been gotten, and this by Mr. *Piggott's* means, perhaps it might under such circumstances have been allowed a revocation. (1)

(1) The testatrix by her second will gave part of these lands to charitable uses, and they were decreed at the Rolls to be good as an *Appointment* upon the act of Parliament, notwithstanding

there was no revocation. Gilb. Rep. 138. Prec. Ch. 473. S. C. 2 Eq. Abr. 191. pl. 6. S. C. Vin. Abr. Tit. *Charitable Uses*. (B.) pl. 24.

D E

Term. Sanct. Hil.

3 Geo. I. In Scacc.

James St. Amand *vers.* Barbara Countess Dow-Cafe 141.
 ager of Jersey, Administratrix of Edward
 Earl of Jersey, & al'.

A Bill in the Exchequer was brought by the plaintiff on behalf of himself and other bond creditors of *Edward* Earl of *Jersey*, against the defendant his administratrix, *William* Earl of *Jersey* his son, *Hen. Villiers*, Esq; his younger son, an infant, by his guardian and other trustees for the said infant, setting forth, that *Edward* Earl of *Jersey* was indebted by bond, dated the 30th of *May* 1707. to the plaintiff in the penalty of 7000*l.* for payment of 3500*l.* and interest, and to *Eliz. Harris* by bond dated the 20th of *May* 1709. in 400*l.* for payment of 200*l.* and interest, and being (or one *Richard Topham* in trust for him) seised in fee of two fee-farm rents, one of 40*l.* 3*s.* 4*d.* the other of 2*l.* 5*s.* 8*d.* subject to 40*l.* annuity to *Rachel Mason* for her life; he and his trustees by lease and release dated the 1st and 2d of *June* 1710. for natural love to the said *H. Villiers* convey the said fee-farm rents to his eldest son Lord *Dartmouth* and Lord *Bathurst* and their heirs, in trust, after the death of *Eliz. Mason*, to sell, and the money raised by the sale to dispose of in an annuity or place for the said *Hen. Villiers* for his life, and if he died before any sale could be, in trust for himself and his heirs.

A voluntary conveyance is bad against bond-debts contracted afterwards, in a Court of Equity. Vin. Abr. Tit. Voluntary Conveyances. (D.) pl. 6.

ST. AMAND.
q. Lady JER-
SEY.

After this settlement *Edward Earl of Jersey* becomes indebted to others on bond, and died in *September 1711*. without personal assets sufficient for creditors; and the scope of the bill was, to subject the said fee-farm rents to the bond-creditors in like manner as if they had descended to the heir.

(a) St. 3 Will.
& M. c. 14.
made perpetual
by stat. 6 & 7
Will. 3. c. 14.

Mr. *Vernon* by his opinion dated the 9th of *February 1716*. had declared, that the conveyance being voluntary, and for the benefit of a child, will be deemed fraudulent as against bond-creditors; and the (a) statute made for the relief of the bond-creditors against fraudulent devises goes upon the supposition, that a voluntary conveyance made would have been fraudulent at Law. That if there had been no bond-creditors at the time of the conveyance, it might have created a doubt, whether it had been done to defeat bond-creditors; but there being debts then owing by bond, he thought it would be void, even against bond-debts contracted after, or that if it were otherwise, it would come to the same thing, since the estate in question is not to answer the bond-debts prior to the conveyance; and if necessary, the latter bond-creditors would be admitted to stand in the place of the prior bond-creditors, and the assets so marshalled, that all might receive a satisfaction as far as the assets will extend.

2 Vern. 327.
3 Atk. 93.

And agreeable to this opinion on the 22d of *February 1716*. the Court decreed, that the fee-farm rents should be sold for the benefit of the bond-creditors, and that the trustees should all join in any conveyance to be made for that purpose.

D E

Termino Pasch.

3 Geo. I. In B. R.

Reeves *vers.* Trindle *alias* Trundle.

Case 142.

AN appeal of murder was brought by the plaintiff, as brother and heir of *Gerard Reeves*, by writ against *William Trundle*, returnable in the King's Bench *a die Pasch. in quind' dies*, and tested 22 *Martii*; and on the first day of the term, the plaintiff being an infant was admitted by his guardian; and because the Sheriff of *Suffex* did not return his writ, nor had the body of the appellee in Court, a rule was granted against him to make a return of his writ, and on the next day, (*viz.*) the second day of the term, a *Habeas Corpus* was granted by rule of Court to have the prisoner *cum causa capt' & detention'* returnable *die Martii prox' post mensem Pasch.* and upon the day of the return of the *Habeas Corpus*, the prisoner was brought into Court, and the writ of appeal and *Habeas Corpus* with the returns to them, were delivered into Court by the Sheriff and read; and because the return to the writ of appeal was *paratum habeo*, which referred to the first day of the term when the writ was returnable, though the prisoner was brought into Court upon the *Habeas Corpus die Mart' post mensem Pasch.* the Court directed that the prisoner should be brought to the bar again by rule two days after, and in the mean time the Court would consider whether it would not be proper to return on the writ of appeal, *languidus in prisona*, and to have a *Habeas Corpus licet languidus* returnable on a day appointed by

Where the Court quashes all proceedings on a writ of appeal for murder, the appellant may be admitted to prosecute his appeal by bill against appellee in *custod' mar'*.

1 Str. 402. S. C.
Vin. Abr. Tit.
Appeal. (O.) pl.
18. 2 Hawk. P.
C. 232. Skin.
634. 2 Inst. 557.
1 Ro. Abr. 536.
5 Burr. 2643.
2 Bl. Rep. 710.
S. C.

T 3

rule

REEVES v.
TRINDLE.

The whole term
is but one day in
law. 1 Will. 37.

rule of Court, to bring the prisoner to the bar again; but on consideration it was thought proper that on the writ of appeal the return should be *paratum habeo*, &c. for the whole term is but one day in law, and therefore when the prisoner is brought into Court by the sheriff, that has relation to the day of the return; and tho' a *Habeas Corpus* was granted, upon which he was brought into Court, yet that was not any regular process in the action upon which the appellee was brought into Court, for when he appeared he appeared on the writ of appeal.

And a precedent was cited — *Anna*, when *Holt* was Chief Justice where the proceedings were in the same manner, viz. the writ was returnable the first day of the term, and the prisoner not being then brought into Court a *Habeas Corpus* was granted for a day subsequent, and on the return of that, the prisoner came into Court, and the sheriff returned to the writ of appeal *Parat' habeo* as here, and then the prisoner was arraigned; and the same manner of proceeding was now approved of by the Court, and the prisoner being brought to the bar was arraigned in *French* on the writ of appeal.

The defendant by his counsel demanded *Oyer* of the writ and the return, and had time given him by the agreement of the party, to consider of his plea till the last day of the term.

Vin. Abr. Tit.
Additions, (M.)
pl. 10 Andr. 142.
2 Hawk. P. C.
275.

On the last day of the term the prisoner was at the bar, and the appellant and his guardian being called to appear in Court, the prisoner pleaded in abatement of the writ, that his addition of degree or mystery was (1) omitted; and having also demanded *Oyer* of the *Habeas Corpus* and the return, demurred to the count, and pleaded over to the felony.

But this seems to be improper, for the *Habeas Corpus* was not any process in the action, neither had the appellant made any count, for the defendant was only arraigned.

(1) In the report of this case in *Strange*, it is said, that the defendant pleaded in abatement, that he was not a labourer, according to the addition the writ, but a barber shirurgeon. 1 Str. 402.

But

REEVES v.
TRINDLE.

[259]

But because there was that misprison in the writ of appeal in which the appellee was named *William Trindel alias Trindel de F. in Com' Kent*, without any addition for his state, degree or mystery, it was prayed that the writ and proceedings thereon might be quashed, and that the defendant who was before committed to the *Marshalsea*, might be now charged by bill as in *Custod' Mar' B. R.* for by the statute 1 H. 5. c. 5. in writs original, appeals and indictments, there must be given to the name of the defendant the addition of his state, degree or mystery, and the town or place and county where resident; and if any be outlawed when such addition is omitted, the outlawry shall be void, and the process before outlawry shall be abated on the exception of the party; and therefore where such omission appears to the Court, and the party takes exception for want of such addition, the Court may *ex officio* quash and abate the process where such omission is. And here the Court quashed all proceedings on the writ of appeal by rule.

And afterwards the appellant was admitted by guardian to prosecute his appeal by bill against the appellee in *Custod' Mar'*, and the appellee was arraigned in *French per bill*, and the defendant had time allowed him to consider of his plea till the 2d day of the next term, *tunc pro nunc*, for there could be no imparlance. (2) 2 Lord Raym.
1288.

And this proceeding seems to be warranted by former cases, for an appeal may be pursued by writ or by bill in the King's Bench. *Stamf. Pl. Co.* 64. b. 2 *Inst.* 420. *Stat. (a)* 3 H. 7. (a) *St. 3 Hen. 7. c. 1.* And therefore if it be commenced by writ, but the proceedings on the writ are annulled within a year, and the party be in the custody of the Marshal of the King's Bench, the appellant may afterwards proceed against him by bill; and so was the case between *Watts* and *Brains*, where the appeal was by writ directed to the Warden of the Cinque Ports, returnable

(2) But neither side, bringing it on for near three years, the defendant now moved to be bailed; and the appellant said, he did not oppose it. *Sed per Curiam*, we cannot do it; he is convicted of murder, and therefore we cannot bail him, unless the appellant will actually consent; which he refusing to do, the defendant was remanded. 1 *Str.* 403.

REEVES v.
TAINOR.

[260]

(a) 2 Ld. Raym.
1288. Holt.
355. 11 Mod.
216. 230. 254.
(b) 1 Silk. 60.
1 Kel. 89. Holt.
63. Skin. 670.
Carth. 394.
Comb. 410.
12 Mod. 108.
109. 157.
(c) 1 Roll. Abr.
581.

in the King's Bench, against the appellee, for a murder committed in the Cinque Ports, and therefore it was directed to the Warden, and not to the Sheriff; the writ was quashed, and the appellant prosecuted the appellee by bill, as in the custody of the Marshal; upon which bill he was tried and hanged. *Cro. Eliz.* 695. *Yelv.* 13. *Co. Ent.* 59. So where an appellee was arraigned upon bill before the justices of gaol-delivery and removed here, the same proceedings being irregular were quashed, and the prisoner was arraigned *de novo* by bill in *Custod' Mar'*, *Pasch.* 8 *Annae*, B. R. (a) *Smith* versus *Bowen* vide (b) *Armstrong* versus *Liste*, 1 *Salk.* — and though it was denied when there was a declaration against the appellee before the justices of gaol-delivery, yet then it was agreed it might have been so, if they had not declared. So in (c) *Holland's* case, *Cro. Eliz.* 605. where it was denied, it was chiefly insisted on as the reason, for that the appellee was not in the custody of the Marshal, and if there is not a declaration by bill against him it cannot be.

Case 143.

Hussey vers. Hussey & al'. In C. B.

Plea in abatement held bad and repugnant, where it says that there are two persons in com' *Devon'* of the same name without distinction. *Vir. Abr. Tit. Additions.* (N.) pl. 27. *Com. Dig. Tit. Abatement,* (F. 21.)

THIS was a *Quare Impedit* against *John Hussey* and *John Bagwell*, clerk for the church of *D.* in *Devonshire*. The defendant *Bagwell* pleaded in abatement, that in the county of *Devon* there were two persons named *John Bagwell*, sen. clerk, and *John Bagwell*, jun. clerk, and that there is no distinction made; and by the Affidavit according to the statute 4 & 5 *Ann. c.* 16. *John Bagwell* of *A.* in the county of *Cornwall*, clerk, maketh oath that he hath a son *John Bagwell* of *D.* clerk, &c.

And it was now moved, that this plea should be rejected as frivolous, for by the statute 4 & 5 *Ann.* 16. dilatory pleas shall not be received in any Court of Record, unless the defendant by Affidavit shews the truth thereof, or shews some probable matter to the court to induce them to believe that the fact of such plea is true; here the fact of the plea is, that there are two persons in the county of *Devon* named *John Bagwell*, clerks,

clerks, but the Affidavit only says, that *John Bagwell* clerk, hath a son named *John Bagwell*, clerk, but the father is named of *A.* in the county of *Cornwall*, and it does not appear that he was of *Devonshire*, but only that the son is there.

HUSSEY &
HUSSEY.

Secondly, This plea is not pleadable in this action, for there need not be a distinction of names but in actions where process of outlawry lies, or in assise where an attachment goes against the defendant, and the recognitors appear the first day of the return of the writ, and the defendant, who pleads that there is no distinction of the name given him, pleads also to the assise, and therefore there is no delay.

[261]

But where the action gives such a description of the defendant as distinguishes him from all others of the same name, there is no need of any distinction of senior or junior, as in debt upon a bond; for the defendant is distinguished by the execution of the deed, and if he did not execute it, he may plead *non est factum*. *R. 9 H. 7. 21. b.*

So in dower, or *precipe quod reddat*, there is no need of the distinction, for the summons must be of the tenant of the land, and if another be summoned he may disclaim. *L. 5 Ed. 4. 25. a.*

So here the summons is only against the disturber or clerk instituted to the church, and if he be not truly summoned, the judgment upon the grand distress will be avoided. *Searle vers. Long, 1 Mod. Rep. 248. (a)* If he be summoned (a) *1 Mod. 264.* he receives no prejudice, and he is sufficiently described by his being the disturber.

So there is no need of any distinction when the defendant himself appears, as here. *39 H. 6. 46. 27 H. 8. 1.*

But upon this matter the Court gave no opinion, but for want of a proper Affidavit the plea was rejected; and the Chief Justice said that the plea was in another respect repugnant, because it says, two persons in the county of *Devon* were named *John Bagwell* sen. and *John Bagwell* jun.

N. B.

HUSKEY v.
HUSKEY.
Com. Dig. Tit.
Abatement,
(F. 21.)

N. B. There is no need of any distinction but where there is father and son of the same name. 44 Ed. 3. 34. b. 33 H. 6. 33, 44. 39 H. 6. 46. a.

Case 114.

Anonymous.

Words, *That I never forged any man's hand, but you are a forging rogue*, when spoken of an attorney, held actionable.
Vin. Abr. Tit. Actions, (S. 2.)
fl. 10. Latch.
20. Poph. 177.
S. S. Palm. 441.
S. C. 1 Brownl.
16. Hetley 140.

THIS was an action for the following words, (*viz.*) *I never forged any man's hand, but you are a forging rogue.*

And it was moved in arrest of judgment, that the words were not actionable though spoken of an attorney; and a verdict found for the plaintiff.

For to say *you have forged my hand* without any thing more is not actionable; by *Gawdy* and *Wray*, 3 Leon. (1) 231. So if a man says you are a forger, without saying what you forged.

And in all cases where the words do not shew an accusation for such a forgery, that an indictment or information might be maintained thereon if the words were true, an action will not lie.

And here when it is said, *I never forged any man's hand*, admitting it to be tantamount to saying *you forged a man's hand*, yet it does not appear that he forged it to any writing for which an indictment or information would be maintainable, and an indictment for forging a man's hand without any thing more is not maintainable.

If then the words are not of themselves actionable, neither will they be actionable though spoken of an attorney, for there is no *colloquium* concerning his profession alledged, and therefore according to *Hibart* (a) 305. in the case of *Powel* versus *Wynde*, these words spoken of an attorney are not actionable, (*viz.*) Mr. H. hath found forgery against him, and can prove it, for no certainty appears of what this forgery was.

(a) Hob. 327.
Hutt. 41. S. C.
Vin. Abr. Tit.
Actions, (Y. 2.)
fl. 66.

(1) In the case of *Jones v. Herve*, above is maintained, and the authority a Wilson 87. a contrary doctrine to the of the case in the text is denied.

But

But it was resolved by the whole Court, that the words were actionable, for by the common intendment of the hearers it would be taken as a great reproach and defamation, to say of one who was an attorney that he forged another man's hand, and therefore is a forging rogue ; and this is the import of the present words, for when the defendant says *I never forged any man's hand, but you are a forging rogue*, the antithesis by common intendment and in the apprehension of the hearers amounts to a charge that the plaintiff did what the defendant denied of himself, and these words spoken of another import scandal and defamation on him ; and the plaintiff had his judgment.

D E

Term. Sanct. Mich.

4 Geo. I. In C. B.

Case 145.

Field *vers.* Workhouse. In C. B.

A sheriff cannot take a bail-bond upon an attachment for a contempt.

Vin. Abr. Tit. Contempt. (B.)

pl. 29. Co. G.

14. 100. Prac.

Reg. 53. S. C.

Tidd's Pr. 104.

1 Ld. Raym.

722. 2 Salk.

608. S. C. 1 Vent. 217.

Barnes 64. 1 Str. 479.

Gilb. Rep. 84. 2 Bl. Rep. 955.

Proc. Cha. 331. 3 Leon. 208.

Stile 212. 234. (a) St. 23 H. 6. e. 9.

THIS was an action of debt upon a bond. The defendant pleaded the *stat.* 23 H. 6. (a.) which makes all bonds, &c. taken by a sheriff *colore officii* void, and said, that an attachment issued out of this Court against *A.* for a contempt, and upon that the sheriff took this bond from the defendant *colore officii* for the appearance of *A.* To this the plaintiff demurred.

And the question was, whether the sheriff could take a bail-bond upon an attachment for a contempt? And it was resolved that he could not; and *King* Chief Justice delivered the opinion of the Court, and said, that upon an attachment of privilege, attachment upon a prohibition, attachment in process upon a penal statute, the sheriff might take bail; but not upon an attachment for a contempt, for that is not within the words or the intent of the statute.

Judgment was given for the defendant.

Powell *vers.* Bull & al'. In C. B.

Case 146.

IN an action of trespass, upon not guilty pleaded, a case was stated before Lord Chief Justice *King*, at the assizes at *Chelmsford* in *Essex*, and afterwards argued in Court, by which it was stated, that the plaintiff was rector of *St. Botolph's* in *Colchester*, that by the statute (1) 9 & 10 W. 3. intitled, *an act for erecting hospitals and workhouses within the town of Colchester in the county of Essex, for the better maintaining the poor thereof*, it was enacted, that after the 24th of June 1698. there shall be a corporation in the town of *Colchester*, consisting of the Mayor and Aldermen, and forty eight other persons to be chosen out of the four wards in the town, (*viz.*) twelve out of each ward, by votes of inhabitants paying or rated at 1 *d.* *per week*, or more, towards the poor rates, according to the usual way of rating in the said town. That they shall hold courts or assemblies on the second *Tuesday* of every second month, for the ends in the said act mentioned. That the Corporation at every such Court may make rules, &c. for the governing of the said Corporation and the poor of the said town, to erect hospitals, workhouses, to provide necessities to set on work the poor, &c. send to the house of correction, &c. put out apprentices, &c. That for the better carrying on so charitable a work, the said Courts may ascertain what sum is needful for the maintenance and employment of the poor, so as it does not exceed what was paid to the poor in any of the three last years; and so as the poor of all the parishes in the said town unable to work be provided for there-out, to the intent that no other levy or assessment be made for the poor of the said town; and may proportion out, rate and assess the said sum or sums of money on the respective inhabitants or occupiers of lands, houses, tenements, tithes impropriate, appropriation of tithes, and all persons using stock and personal estates in the said town or liberty of the same, in

The word *tenement* mentioned in the stat 9 & 10 W. 3. for the workhouse corporation of *Colchester*, extends to a rectory.

(1) This act is rendered more effectual by the stat. 15 Geo. 2. c. 18.
equal

POWELL &
BULL.

equal proportion, according to their respective value, to be levied by distress and sale, &c.

That the plaintiff was assessed according to the said statute for his tithes, parcel of the said rectory, and that by a warrant, &c. the defendant took the goods in the declaration for such said assessment; and if the tithes, parcel of the said rectory, might be assessed, was the question.

And it was agreed, that an ecclesiastical person was bound by acts of parliament, if the words extend to him, and therefore he is chargeable by the statute 43 *Eliz. c. 2.* as an inhabitant; for the statute says, every inhabitant, parson, vicar or other, &c. So to send his teams to the highway. (a) 1 *Vent.* 273. 2 *Lev.* 139. S. C. *Lut.* 1563. So in 2 *Inst.* it was agreed, that an ecclesiastical person would be within the statute 27 *H. 8. c. 24.* by which it was enacted, that purveyors might provide victuals, &c. within liberties, or without, if he had not been within the proviso of the same statute, (*viz.*) provided that the statutes in such cases provided be observed; and therefore ecclesiastical persons being exempt from a purveyance by *Mag. Charta*, 9 *H. 3. 21.* and other acts, are within the proviso, otherwise they would have been liable to the purveyors. 2 *Inst.* 3. And the sole matter insisted on was, that tithes were not liable to be assessed within any words of this act, and it was insisted, that the plaintiff could not be charged to the poor rate of *Colchester*, if he was not within the words of this new act, though he was chargeable by the statute 43 *El. c. 2.* in which he was expressly named; but by the words of this act the plaintiff was not rateable to the poor for his tithes; perhaps, as inhabitant, he might be assessed for his personal estate: but this act, being introductive of a new law, shall be taken strictly, and therefore if the words do not expressly describe him, they shall not be extended to him. A parson was not chargeable to temporal charges by the common law; and therefore an act of parliament, if the words and intent are not plain and manifest, shall not extend to charge him; but this act only charges the occupiers of lands, houses, tenements, tithes impropriate, and appropriation of tithes; the plaintiff cannot be charged as an occupier of

(a) 1 *Freem.*
396. 457. S. C.
3 *Keb.* 476.
S. C.

tithes impropriate, for these words mean only the patentees of the King, where tithes are in lay persons; and appropriation of tithes was where tithes were appropriated to a religious house; or perhaps a portion of tithes in another parish which belonged to the parson of St. Botolph's, might be assessed in that parish, whence the portion of the tithes issued or arose, but could not be charged here in the parish of St. Botolph; to which the Court agreed. Then the words *houses and lands* do not extend to tithes nor the word *tenement*, which import only what may be holden by some service.

POWELL v.
BULL.

Fort. 319. 1 Str.
77. 100. 525.

To which it was answered and resolved by the whole Court, that the word *tenement* extends to a rectory, for that may be holden in *Frankalmoine*; and the word *tenement* extends not only to that which may be holden by some service, but comprehends all that a man may be seised of *ut de libero tenemento*, Co. Lit. 6. a. and that a rector has the frank-tenement of his rectory appears by Co. Lit. Sect. 647.

Co. Litt. 159. a.
1 Sid. 102.
O. Bendl. 147.
W. Jon. 23.
Watf. 3d edit.
581.

Judgment was given for the defendant.

Upton *vers.* Pinfold & Ux'. In C. B. Intr. Case 147.
Trin. 3 Geo. Rot. 850.

IN an action upon the case for words, the plaintiff declared that the wife of the defendant 23 Sept. 3 Geo. *eadem Jana adtunc & ibidem colloquium haben. cum quodam Johan' Austin servo quer' dixit de quer' verba sequen'*; you (*præd' Austin innuendo*) are a great rogue and rascal, as great a rogue as your master (*præd' quer' Magist' dict' Johan' Austin adtunc existen' innuendo*) who (*præd' quer' innuendo*) is a rogue, for that your master and dame (*præd' quer' & A. uxor' ejus magistrum & magistram ipsius Johan' Austin innuendo*) stole rugs and quilts. Upon a demurrer to the declaration it was objected,

An allegation in an action for words, that *præd' Jana adtunc & ibidem colloquium habens cum servo quer'*, is sufficient, for the *adtunc* refers to the whole clause.
Vin. Abr. Tit. Actions (P. a.) pl. 41. (C. b.) pl. 3.

First, that by those words *non constat de personâ*, for the *Colloquium* is alledged with *John Austin servo quer'*, and perhaps he was his servant at the time of the declaration, but it does not appear

In Tra. p. 528.

URTON v.
PLATTOP.

appear that he was his servant at the time of the discourse; for it is not said *ad tunc servo*, and then the *innuendo quer' ad tunc Magist'* is not sufficient, for an *innuendo* may explain, but can never enlarge the words.

Secondly, *De quer'* is not a sufficient allegation (without alledging a *colloquium de quer'*) that the words were intended of him; and therefore in an action for words alledged to be spoken of a plaintiff to a wife, (*viz.*) *Thy husband and his master (innuendo the plaintiff) stole my wood* it was resolved that it was not maintainable without an express averment, that the plaintiff was master or husband. 1 *Rol.* 80. *pl.* 4. 2 *Bul.* 81, *Mo.* 63. *Dal.* 66. S. C. So if words were spoken to a father or mother of a plaintiff, *thy son (innuendo the plaintiff) stole, &c.* 2 *Cro.* 635. (a) 1 *Roll.* 84. (b) *pl.* 4. *Cro. Car.* 442. per *Croke* and *Whitlock*, *Cro. Car.* 177. and there two judgments cited by *Croke* accordingly; but *Hyde C. J.* and *Jones* doubted, and therefore it was adjourned. - So if *Colloquium de quer'* was added, it was doubted of, *Cro. Car.* 420. (c) 1 *Rol.* 84. *pl.* 1. So where the words were, *thy father, (innuendo the plaintiff)* if it does not appear that the son was present (though a conversation concerning the father is alledged). (d) 1 *Rol.* 85. *pl.* 9. *Sed non allocatur*; for the allegation *Prad' Janâ ad tunc & ibidem colloquium habente cum Johanne Austin servo quer'* is sufficient; for the *ad tunc* refers to the whole clause, and imports, that he was then his servant when the discourse was between them.

(a) *Palm.* 283.
S. C.
(b) *March* 62.
Infra p. 529.

(c) *W. Jon.* 376.
S. C.

(d) *Vin. Abr.*
Tit. Actions.
(K. b.) *pl.* 9.
Infra p. 529.

Cro. Elis. 250.

Thirdly, It was objected, that here the words themselves are uncertain; for it does not charge him directly with felony, but it is only given as a reason why she called him rogue, *for that he stole, &c.* and does not say *they were the goods of a stranger*. So the words *you are as bad as thy wife when she stole my cushion*, were adjudged not actionable, without an averment that the felony was committed. 2 *Cro.* 331. 1 *Rol.* 78. *pl.* 1. *Sed non allocatur*; for there the words were *when she stole*, and without an averment that the goods were taken away there does not appear to be any charge; and therefore judgment was given for the plaintiff.

Parry *vers.* Berry. In C. B.

Case 148.

THIS was an action of Trespass. The defendant pleads, that by letters patent of 1 Jac. 1. the inhabitants of *Chippen-Camden* were incorporated by the name of the bailiffs and burgeses, and that there were 12 capital burgeses and 12 common burgeses, and that the bailiff and capital burgeses had power to make bye-laws; that on the 8th of *March* 1 Jac. 1. the bailiffs and burgeses made a bye law, that no person inhabiting out of the borough, or not free of the borough, should set forth goods to sale, except victuals on market days, in any market within the borough, &c. that the plaintiff not being free of the borough kept a shop and set forth goods, not being victuals, in the market of the borough on a market-day; and therefore, for the penalty of the bye-law the defendant being an officer within the borough took the plaintiff's goods in the declaration mentioned. Upon a demurrer it was resolved, that this bye-law was void; for without a custom such a bye-law, to restrain persons not being free of the borough from exercising a trade, cannot be maintained; and it was so ruled in *Norris versus Staples*, (a) *Hob.* 210. *Moore* 869. S. C. *Hutt.* 5. S. C. 1 *Brownl.* 48. S. C. *Noy* 19. 1 *Roll. Rep.* 4. (b) in *Waggoner's* case. 8 *Co.* 125. (c) 2 *Roll.* 202. (d). *Cart.* 68, (e) 144. and therefore this bye-law by a corporation is void. But this exceeds all bye-laws made in *London* or elsewhere, for it not only excludes persons from using their trade within the borough, but also from resorting to the market.

A bye law to restrain persons from exercising a trade, not being free of a borough, held void.
Vin. Abr. Tit. Bye Law (A. 2.)
pl. 28.

(a) 1 *Roll. Abr.* 364. *pl.* 4.
 2 *Ld. Raym.* 1131. 1 *Salk.* 203. S. C.
 1 *Lutw.* 562.
 (b) 11 *Co.* 53.
 S. C. *Godb.* 252.
 S. C.
 (c) 2 *Brownl.* 278, 284. S. C.
 (d) *Cro. J.c.* 596. S. C.
 Nov. 98. S. C.
 (e) 2 *Raym.* 1133.

1 *Jon.* 13. S. C. *March* 77. (e) 2 *Raym.* 1133.

Secondly, It was made by the bailiffs and all the burgeses, where it ought to be by the capital burgeses only.

Judgment was given for the plaintiff.

Case 149. Saunders, qui tam, *vers.* Stevens. In C. B.

A term for years was determined to be a qualification for a commissioner of the land tax. (a) 1 Geo. 1. stat. 1. c. 2.

(b) 12 Ann. stat. 2. c. 1.

THIS was an action of debt for 200 *l.* The plaintiff declared, that by the stat. 1 *Geo.* (a) ——— intitled, *An act for rectifying mistakes in the names of the Commissioners of the Land-Tax for the year 1714, &c.* the several persons after named were authorized to put in execution the act made in 12 (b) *Anne*, for granting an aid, &c. by a land-tax for the service of the year 1714. as Commissioners for the Land-tax, in the same manner as if enabled or named commissioners by the said act, being nevertheless subject and liable to the qualifications and penalties in the said act appointed and required.

That by the said act 1 *Geo.* the defendant was named a commissioner for the county of *Surry*; that by the statute 12 *Anne*, *fo.* 156. it was provided and enacted, that no person shall be capable of acting as a commissioner in the execution of this act in or for any county at large within *England* or *Wales*, (*Merioneth, Cardigan, Carmarthen Glamorgan, Montgomery, Pembroke and Monmouth* excepted) or in or for any of the ridings of the county of *York*, unless such persons be seised of lands, tenements or hereditaments which were taxed or did pay in the same county or riding for the value of 100 *l. per annum*, or more, of his own estate, by virtue of a preceding act 12 *Anne*, (c) for granting an aid, &c. for the year 1713.

(c) 12 Ann. stat. 1. c. 1.

That the defendant acted as a commissioner for the county of *Surry*, by signing duplicates, &c. not having lands or tenements which were taxed to the value of 100 *l. per annum de proprio statu*, according to the precedent statute of 12 *Anne*, for the service of the year 1713.

After *Nil debet* pleaded at the trial it appeared upon the evidence, that the defendant had not lands of freehold more than 10 *l. per annum*, but was possessed of lands of 100 *l. per annum* for the remainder of a term of thirty years, which were taxed to the value of 100 *l. per annum* the precedent year; if he

was qualified to be a commissioner was the question; and if he was not, whether this action was discharged by the act of general pardon (*a*) 3 Geo.

SAUNDERS v.
STEVENS.

(*a*) St. 3 Geo. 1.
c. 19.

As to the first question it was urged, that this statute requires that every one who acts as a commissioner should be seised of lands or tenements of 100*l. per annum*; therefore a term for years does not make a good qualification, the word *seised* imports a freehold at least: and he who has but a term for years is not said to be seised of it, but only possessed. *Co. Lit.* 17. *a*. And therefore where the statute of 27 H. 8. c. 10. saith, that where any person, &c. stands or is seised, or shall hereafter be seised of any lands, tenements or other hereditaments to the use, confidence or trust of another, &c. the person who hath the use shall be deemed to be in the seisin or possession of the same lands and of the same estate which he had in the use.

Co. Litt. 200. b.
201. a. 6 Rep.
57. b.

If a term of years be assigned to *A.* to the use of *B.* this shall be a trust for *B.* and not an use executed; for *A.* is not seised, and therefore it cannot be an execution of an use by the force of the statute 27 H. 8. and so it was resolved by all the Justices, *Dyer* 369. *a*. which is cited and allowed *Mo.* 614. So where by the statute 8 H. 6. c. 9. it is enacted, that upon complaint of any forcible entry or detainer, the justices of the peace shall cause to be re-seised the lands so entered upon or holden.

If a termor be ousted, he is not within the statute 8 H. 6. for a justice of the peace cannot cause him to be re-seised who never was seised, *Mo.* 614. and therefore a remedy was given for copyholders and lessees, &c. by the stat. 21 Jac. 1. c. 15.

But in *Mich.* 4 Geo. 1. the Court gave judgment unanimously for the defendant; and held, that he had a sufficient qualification to act as a commissioner; but they also held, that supposing him not qualified, the general act of pardon would not have excused him.

Case 150.

Walker *vers.* Holyday. In C. B.

Where tenant in common declares against another as receiver, it ought to be shewn by whose hands he receives it, otherwise he ought to be charged as bailiff.

Vin Abr. Tit. Account (H.)

pl. 10.

Com. Dig. Tit.

Account (B.)

(E. a.) Co.

Lit. 172. a.

2 Lev. 126.

3 Keb. 435.

S. C.

(a) St. 4 Ann.

c. 16. S. 27.

AN action of account was brought against the defendant as Bailiff, and also as receiver for the eighth part of the profits of lands which the plaintiff and defendant and others held in common, and which the defendant had received, and for so much money which the defendant had received to his own use. As to the account against him as bailiff, the defendant entered into the account; as to the account against him as receiver, the defendant demurred, and shewed for cause, that the plaintiff did not say by whose hands he received it. (1) It was urged, that this exception was now taken away by (a) 4 & 5 Anne, c. 16. by which one jointenant or tenant in common may have an account against the other for receiving more than comes to his proportion, &c. and therefore when it appears here by the declaration, that the plaintiff and defendant are tenants in common, it is sufficient, without saying by whose hands the profits were received. *Sed non allocatur*; for *per Cur*, by the statute one jointenant or tenant in common cannot charge the other but as bailiff; for by the common law an action of account lay not by one tenant in common against his companion, but where there was an express authority given to take his part of the profits, and then he was chargeable as bailiff, but now by this statute he may be charged. If he receives his companion's share of the profits, though it be without his privity, yet he ought to be charged as Bailiff (2) by the express words of the statute, and cannot be charged as receiver; and therefore, as the declaration charges him as Bailiff, and also as receiver in declaring against him as receiver, it ought to be shewn by whose hands he received it, as it ought by the common law; and this being assigned for cause of demurrer, judgment was given for the defendant.

(1) The omission in this case was only form, and a judgment *Quod computet* would have aided it. 2 Lev. 126. 3 Keb. 435. S. C.

(2) The difference between a bailiff and receiver consists in this, that the former is allowed his charges and expences, the latter is not. Co. Litt. 172. a. 1 Rol. Abr. 119. pl. 9. 1 Rol. Rep. 87.

There is also this other natural difference between a bailiff and receiver, that he cannot plead when he is charged as bailiff, that at another time he was charged as receiver. 1 Rol. Abr. 119. l. 45. Vin. Abr. Tit. Account. (H.) pl. 3.

D E

Termino Pasch.

4 Geo. I. In C. B.

Anonymous.

Case 151.

IN an action on the case, by which the plaintiff declared that he was seised in fee of an antient messuage in *London*, in which there had been time out of mind an antient light, and that the defendant by erecting a new house contiguous to it, had stopp'd up the same to his damage, &c.

In an action founded upon an injury, every thing which shews that the defendant did what he lawfully might do, may be given in evidence upon

not guilty. 1 Bullst. 115. Yelv. 215. S. C. Godb. 183. S. C. 1 Burr. 248. 1 Com Dig. 215 4 Com. Dig. 199 Hutt. 136.

1 Roll. Abr. 558.

The defendant pleaded Not guilty, and upon the trial before *King C. J.* at the sittings after last term it was given in evidence, That by the custom of *London* every citizen upon an antient foundation may build a house as high as he pleases; that the defendant had an antient house contiguous to the plaintiff's house, and rebuilt it upon the antient foundation and of the same dimensions, and that he stopp'd up the plaintiff's window, which before was higher than the defendant's house; whereupon the defendant had a verdict.

And Serjeant *Darnel* moved for a new trial.

First, Because the custom is not good.

Secondly, If the custom be good, it ought not to be given in evidence upon Not guilty.

U 3

A₄

ANONYMOUS.

(a) *Calthrop's Reports, &c.*
edit. 1670. p. 7.

(b) 1 Sid. 167.
1 Lev. 122.
Raym. 87.
1 Keb. 553. 625.
794. 836.

Skins. 321.
Supra p. 4. and
the cases there
cited.

As to the custom he insisted, that it was unreasonable by a new building to stop another person's window, for which there cannot be any good reason given, and although such a custom be mentioned by *Calthrop* (a) — yet the reasons there given for it are weak. *Sed non allocatur.* For the (1) custom there was not disallowed, and it was upon good reasons, for by the common law every one may make what erection he pleases upon his own soil; then if one builds an house upon his own soil, another may erect a messuage upon his soil adjoining to it, and stop all his windows which are towards his soil. (b) 1 *Syd.* And in a city where there are divers antient messuages it is reasonable that if one raises his house higher than his neighbour's, that the other may at any time afterwards raise his house as high as he pleases, and the advantage or disadvantage is equal to one as the other; then as to the pleading of such general custom, the Chief Justice said that evidence upon the general issue had of late been allowed in many cases, which in former times would not have been admitted, and therefore in an action upon the case, which is founded upon an injury done by the defendant to the plaintiff's damage, every thing which shews that the defendant did what he lawfully might do, might be given in evidence upon Not guilty pleaded; for that proves that he had done no injury; and a new trial was denied for these reasons.

(1) A custom to build upon a new lights is void. 1 Roll. Abr. 566. Yelv. foundation to the obstruction of antient 210. 9 Co. 58. a.

Case 152.

Marriott *vers.* Shaw & al'.

A conviction
super præmissis
for three penal-
ties of five pounds
each for killing
three hares,
where it appears
that it was done
at the same
time, is bad, for the statute does not give five pounds for every hare, it being all but one offence. 2
Burn's Just. 335. Cowp. 610. 646. 10 Mod. 26. 3 Term Rep. 509.

AN action of replevin was brought by *John* and *Richard* *Marristt*, *quare ceperunt bona & catalla ipsor' Richardi & Johannis* (viz.) *unum dolium piperis Jamaici, quatuor al' Dolia & un' al' parcell' sibi ad valent', &c. apud Mansfield, &c.*

The defendant *Rowland Shaw ut Constabularius de Mansfield*

in

in com' Nott' præd' bene advocat, and the other defendants ut
servien' i'fius Rowlandi bene cogn', &c. quia dicit quod 17 Oct
2 Geo. apud Mansfield præd. William Toone ven' coram J. Digby
Ar' un' Juss' Domini Regis ad pacem, &c. in Com' præd' & de-
dit information' præfat' Juss' quod præd' Richardus Marriott
tallow chandler infra tres menses ult' (viz.) 15 Oct' 2 Geo. ad-
tunc existens persona per leges Angliæ minime qualificat' seu allocat'
ad custodiend' aliquem canem leporar' ad occidend' & destruend'
feras, &c. apud E. in Com' præd' un' canem lepor' ad occidend'
& destruend' feras, & apud C. in Com' præd' un' al' canem lepo-
rar' ad occidendum & destruendum feras illicite custodivit contr'
form' stat' in hujusmodi casu edit' & provis', quodq' præd' Richar-
dus Marriott apud E. & C. præd' eodem 15 die Oct' usus fuit cani-
b'us præd' & eum eisdem canibus un' leporem apud E. præd' & duos
leporas apud C. præd' eodem 15 Oct' illicite interfecit contr' form'
stat' in hujusmodi casu edit' & provis', & superinde postea, (viz.)
præd' 17 Oct' 2 Geo. quidam C. Palmer & C. D. existen' testes
credibiles, &c. deposuer' quod præd' R. Marriott 15 Oct' tunc
existens persona minime qualificat' un' canem lepor' apud E. &
un' al' canem lepor' apud C. illicite custodivit contra form' stat',
quodq' præd' R. Marriott dicto 15 die Oct' un' leporem apud E.
præd' & duos leporas apud C. præd' illicite interfecit, &c. super
quo præd' R. Marriott post summonitionem, &c. coram præfat'
Juss' comperuit, &c. & quia, &c. præfat' Juss' constitit quod
præfat' R. Marriott fuit culpabilis, &c. ideo cons' quod præd'
R. Marriott convic' est de præmissis, &c. Record' ejus convictio-
nis Dominus Rex in cur' Domini Regis coram ips' Rege nuper
certis de causis mitti fecit, prout per record' ill', &c.

MARRIOTT vs
SHAW.

And the defendents ulterius dicunt quod 7 Jan. 2 Geo. præd'
 J. Digby tunc Juss', &c. de & super præmiss' fecit quoddam War-
 rant' in script' Constabular' de Mansfield direct' ad levand' de bo-
 nis & catallis præd' R. Marriott 25 l. per ipsum ut præfert'
 forisfact', virtute cujus warranti 9 Jan' 2 Geo. præd' Rolandus
 Shaw tunc Constabular' & præd' Chr' et Jos' ad requisition' &
 in auxilium præd' Rowlandi ceper' bona & catalla, &c. ad le-
 vand' de medietate præd' R. Marriott 15 l. de præd' 25 l. pro
 tribus offensis, viz. interfectione trium leporum præd' de præd'
 quinque offensis unde præd' R. Marriott convic' fuit.

MARRIOTT v.
SHAW.

The plaintiff in bar to the avowry says, *quod dicto 15 Oct* & ante & continue postea, &c. idem R. Marriott seist' fuit, &c. ut de feodo in suo proprio jure de & in terris & tenementis in D. in com' præd' clari annui valoris 100l. per annum & ultra, ac et ratione tempore quo, &c. fuit persona per leges hujus Regni qualific', &c. unde præd' J. Digby ante conviction' præd', &c. notitiam habuit, & quod convictio illa omnino vacua in lege exist', & hoc, &c.

The defendants in reply dicunt quod præd' J. Digby non habuit notitiam, &c.

To which it was demurred; because the defendants traverse a matter not alledged, not traversable, not triable.

The defendants join in demurrer.

It was argued by Serjeant *Pengelly* for the plaintiff, and Serjeant *Chefbyre* for the defendants.

And it was insisted for the plaintiff, first, That the defendants ought to justify, and not avow, for *Rowland Shaw* took the goods but as an officer, and had not any interest in them. 1 *Roll.* 319. S. 4. 318. L. 45. 320. L. 5. 2 *Cro.* 436.

To which it was answered, that in the cases cited the defendant could not avow or justify, at his election; but if he justifies, he shall not have a return; so resolved 3 *Lev.* 204. And this seems to be but form, which shall be aided upon a general demurrer; as if a defendant avows, where he ought to make conscience, it is but form. 2 *Cro.* 372. And here an avowry seems more proper; for the defendant ought to levy by distress and sale, and therefore ought to have a return, that he may sell.

But as to this point the Court determined nothing.

Secondly. That after the conviction shewn the defendant saith, *Record' cujus conviction' Rex nuper cert' de causis coram just' de B. R. mitti fecit*, whereby the conviction was suspended. To which it was answered, that the conviction was on the 19th of *October*, 2 *Geo.* the warrant upon it on the 7th of *Ja.*

Gillb. Replev.
143.

January, 2 Geo. and the declaration was *Mch. 4 Geo.* then when the defendant says, *nuper mitti fecit*, this refers to the time of the plea, not to the time between the warrant and conviction, which was two years before; but by the stat. 5 Ann. c. 14. a *Certiorari* does not restrain execution but where security is not given for payment of costs.

MARRIOTT v.
SHAW.

Thirdly, That the conviction does not shew five offences, yet the warrant says, that he shall pay 25*l.* and thereupon the defendant levied 15*l. de præd'* 25*l.* for three offences *de offensu præd'*, (*viz.*) *pro interfec-tion' trium leporum præd'*. To which it was answered, that the conviction says, that the Justice was informed, and the witnesses deposed, *quod R. Marriott 15 Oct. 2 Geo. apud E. custodivit canem leporar' ad occidend' & destruend' feras, quod custodivit apud C. un' al' canem leporar' ad occidend', &c. contra form' stat', quod eodem 15 Oct' usus fuit canibus præd' : occidit un' leporem apud E. præd' & duos al' lepores apud C. contra form' stat.* Then the warrant commands that they levy 25*l. sic ut præfert' ferisfact'*, and the defendant levied 15*l. de præd'* 25*l. pro tribus offensis de offensu præd'*, (*viz.*) *pro interfec-tion' præd' trium leporum*; and therefore the conviction has determined that there are five offences, and then the constable may levy for any of the offences; for though all the offences are comprised in the same conviction, it shall be a several conviction for every offence, and the officer may levy for a part, *though not for all*; and if the Justice had determined these to be five several offences, though they are not, this is error in the justice; but the officer shall not be liable for the mistake of the Justice, where the thing is within his jurisdiction.

Fourthly, That the plaintiffs are partners, and the defendant took the goods of both of them.

To which it was answered, that he must take the goods of both to levy out the moiety of one partner. (a) 1 Salk. 392. (a) Holt 302. S. C. 1 Show. 173. (b) (b) Holt 643. S. C. Comb. 217. 2 Mod. 279. 2 Ld. Raym. 871. Cowp. 449. 1 Ves. 239. Doug. 650. Infra p. 619.

MARRIOTT v.
SHAW.

As to the matter of law, it was insisted, that the plaintiff in bar to the avowry says, that he had 100*l. per annum* at the time of the offence and conviction, and for that reason was qualified, &c. of which the Justice had notice; and if he was qualified, which is now admitted by the demurrer, then the Justice had no jurisdiction of the subject matter; and if the thing be out of his jurisdiction, the officer shall not be excused, for all the proceeding is null and void, & *coram non judice*.

Infra p. 524.

To which it was answered, that here it was alledged in the conviction, *quod fuit persona minime qualificat*, and then if he does not alledge his qualification, and insist upon it at the time of the conviction, or when he appeared before the Justice, he shall not plead it afterwards to maintain his action against the constable.

If a cause in an inferior Court be alledged *infra jurisdiction* Cur', though it be out of the jurisdiction, if the defendant does not plead to the jurisdiction he shall not have a prohibition afterwards. (a) 1 Vent. 88, (b) 181. 1 Sid. 464. Raym. 189. 2 Mod. 271. Nor can it be alledged for error in fact. 1 Vent. 236. Nor shall he have an action upon the statute of (c) W. 1. 35. 2 Inst. 230. So trespass lies not against the officer, resolved 2 Mod. 58. (d) 196. though the plaintiff pleads, that the cause of action arose out of the jurisdiction. Lut. 935. (e) 1 Salk. 281. But an action for an escape lies against an officer, tho' he knew the matter arose out of the jurisdiction. 7 Ann. C. B. (f) *Higginson* versus *Shief*.

(a) 2 Keb. 673.
3 Mod. 63. S. C.
(b) 2 Keb. 853.
3 Mod. 81. S. C.
(c) S. Westm. 1.
3 Edw. 1. c. 35.
(d) Freem. 32a.
S. C.
(e) Holt 186.
Supra p. 156.
(f) Supra p. 153.

But afterwards the Court gave judgment for the plaintiff upon the third objection, without determining the matter of law; for that by the conviction there is not any number of offences alledged, for he is convicted *super premissis*, and it appears that it was only one offence; for the statute does not give 5*l.* for every hare, and all was done the same day, and so was only one offence. (1)

Infra p. 524.

(1) Lord Mansfield in the case of *Cripps v. Durdan*. Cowp. 646. declared that "killing a single hare was an offence; but that killing ten more in the same day would not multiply the offence, or the penalty imposed by the statute

Philips *vers.* Smith. In the Exchequer Chamber, 11 May, 3 Geo. Case 153.

A Writ of Error was brought in the Exchequer Chamber upon the statute 27 (a) Eliz. on a judgment in *B. R. Trin. 2 Geo. Rot. 465.* in an action of debt, in which the plaintiff declared against the defendant *Ballivum burgi de Iwelcheſter in com' Somerſet pro eo, videlicet, quod cum villa de Iwelcheſter eſt antiqu' burgu', quodque duo burgenſes ejusdem burgi ad quodlibet Parliament' Domini Regis & antec'eſſor' ſuor' Regum & Reginar' Angl' ad veniend' a tempore cujus, &c. electi fuer' ac eligi conſuever' per burgen' & inhabitant' ejusdem burgi in eâ parte voces & ſuffragia haben', cumque quoddam breve Domini Regis nunc extra Cant' ſuam apud Weſt in com' Midd' 17 die Jan' anno Regni ſui primo, gerens dat' eiſdem die & anno, emanâſſet vic' Som' direct' per quod, &c. prout breve, &c. quod quidem breve poſtea, ſcilicet, 26 Jan' primo Geo. apud Iwelcheſter præd' deliberat' fuit cuidam J. T. ad tunc vic' Som' præd' exiſten' in formâ juris exequend', virtute cujus brevis idem vic' poſtea, ſcilicet, dicto 26 Jan' primo Geo. ibidem fecit quoddam præcept' ſuum in ſcript' ſigillo officii ſui vic' ſigillat' ballivo dicti burgi de Iwelcheſter in com' præd' direct', de & pro election' infra burg' ill' duor' burgen' burgi præd' ſecundum formam & effect' præd' brevis, quod quidem præcept' poſtea, ſcilicet, dicto 26 Jan' primo Geo. apud Iwelcheſter præd' deliberat' fuit præſat' Tho. Smith tunc ballivo burgi ill' exiſten', cui quidem ballivo execut', &c. Virtute cujus præcepti poſtea, ſcilicet, 2 Feb. 1 Geo. apud Iwelcheſter præd' proceſſ' fuit ad election' duor' burgen' pro eodem burgo de Iwelcheſter ad idem Parliament' veniend' ſecundum formam & effectum brevis præd', & ſuperinde idem E. Philips & quidam J. B. Miles, W. B. At*

Tender, that the plaintiff was ready to pay what was due for the copy of a poll, till the officer demands ſomething certain, held a good tender.

2 Bro. P. C.

101. S. C.

1 Str. 136. S. C.

Lilly's Ent.

254.

(a) St. 27 Eliz.

c. 8. ſ. 2.

ſtatute for killing one." — We find a ſimilar deciſion upon this point in the caſe of the *Queen v. Matthews.* 10 M. d. 25. Where the Court were of opinion that the offence for which the ſtatute gave the forfeiture, was the keeping of dogs and engines and not the killing of hares. It was further determined in

this laſt cited caſe that if a man kept dogs and went a hunting ſeveral days, and killed hares, if it was thus laid, that he ſuch a day kept dogs and killed, and then again ſuch a day, by laying it thus ſeverally the offence would be ſevered, and he ſhould forfeit 5 l. for each offence.

& J.

PHILIPS W.
SMITH.

[280]

(a) St. 7 & 8
W. 3. c. 25. f. 6.

Et J. H. Ar' fuer' Et steter' candidat' ad election', &c. Et pro manifestation' election' ill' numerat' capit', Anglice a poll, suffragan' ill' de hujusmodi election' per quosdam eorum requisit' existen', adtunc Et ibidem in script' capta Et habita fuit, coram prefat' T. Smith tunc ballivo burgi ill' existen', Et ipse idem T. Smith eandem numeration' capit' adtunc Et ibidem recepit Et habuit, Et post numeration' capit' suffragan' de, in Et pro election' capit' Et habit, ac finit', scilicet, 10 Feb' primo Geo. apud Iwelcheſter præd' idem E. Philips requisivit præd' T. Smith ballivum burgi p' se tunc existen' ad deliberand' eidem E. Philips copiam numeration' capit', Angl' a Copy of the Poll, suffragan' de eadem election' capit', Et adtunc Et ibidem parat' fuit Et obtulit ad solvend' præfat' T. Smith aliquam rationabil' denarior' summam pro scription' inde quam ipse proinde requireret, præd' tamen T. Smith ballivus burgi præd' ut præfert' existen', cui executio precept' præd' de election' burgen' ut præfert' adtunc pertinuit, debet' officii sui ballivi ejusdem burgi in hac parte ac stat' in hujusmodi casu edit' Et provis' minime ponderans, &c. adtunc vel postea non deliberavit eidem E. Philips copiam, &c. sed ill' ei deliberare adtunc Et postea voluntarie penitus recusavit, cont' form' (a) stat' ill', per quod, &c.

The defendant pleaded *Nil debet*, and thereupon issue was joined.

Upon which a *Venire Facias* was awarded and continued per *Vic' non misit breve* till 15 Mart', and then a *Venire Facias* was awarded returnable O&P pur'.

But the *Venire* taken out was tested 23 Jan' returnable O&P pur', upon which a *Distingas* issued, omitting the word (*Vic'*) in the direction of the writ. Upon the trial at the assizes there was a verdict for the plaintiff, and judgment thereon.

And now there were these errors assigned.

First, That the plaintiff's attorney had no warrant of attorney.

Secondly, That there was no *Ven' Facias*, as is supposed by the record.

Thirdly, That there was no such writ of *Distingas*.

Fourthly,

Fourthly, That no bill was filed which warranted the declaration and judgment.

PHILIPS v.
SMITH.

Fifthly, The general error, that the judgment was for the plaintiff, whereas it ought to have been for the defendant. And upon a *Certiorari* returned it appeared, that the *Ven' Fac'* issued tested 23 Jun', whereas it was awarded 15 Mar.

[281]

That the warrant of attorney for the plaintiff was, *E. Philips po' lo' suo H. G. attorn' suum versus T. Smith ballivum burgi de Ivelcheſter.*

That the *Diſtringas* was *Georgius Dei Gra' Somerset ſaſtem*, omitting (*Vic'*). That the bill was filed *Pasch. 1 Geo.* without any continuance entered till *Pasch. 2 Geo.* when the declaration was entered upon record.

After error assigned as before mentioned, the Court of King's Bench was moved, that the record might be amended.

First, That in the warrant of attorney the word *Bugi* be made *Burgi*; for the warrant of attorney was not filed till *Trin. 2 Geo.* though the bill was filed *P. 1 Geo.* and the declaration was *Pasch. 2 Geo.* and it is ſufficient that the warrant of attorney be filed in the ſame term in which the iſſue was joined, and therefore the warrant of attorney here was filed in due time. By the ſtatute 32 H. 8. c. 30. All perſons ſhall deliver their warrants of attorney to be entered on record, &c. in the ſame term when the iſſue is entered, &c.

Then the warrant of attorney here not being filed till *Trin. 2 Geo.* and the plaintiff having before appeared and declared by the ſaid H. G. his attorney againſt the defendant *T. Smith ballivum burgi de Ivelcheſter*, it appears that H. G. was his attorney againſt the ſame *Tho. Smith ballivum burgi de Ivelcheſter*, and therefore when the entry is *po' lo' ſuo H. G. attorn' suum versus Tho Smith ballivum burgi de Ivelcheſter*, this was a miſpriſion of the clerk, who wrote *Bugi* for *Burgi*, and ought to be amended by the record, in which the entry was well made.

And

PHILIPS vs.
SMITH.

And though it was objected that the bill and the declaration were subsequent to the warrant of attorney, and therefore the entry cannot be amended by them, yet it was amended.

Secondly, That the teste of the *Venire Facias* which was 23 Jan. should be amended and made 28 Nov. for the *Venire facias* was awarded by the Court 15 Mart' which was the last day of Mich. term, and this was a warrant to the clerk to make the writ bear teste the same day, and if he did not do it, his misprision shall be amended by the stat. 8 H. 6. c. 12. which enacts that Judges may examine, and in affirmance of judgment amend what to them seems the misprision of the clerk in any process, &c. and therefore where a *Venire* was tested after the return of the writ, (viz.) on the 12th of February, which was the last day of Hil. term, and the return was 15 Hil. it was amended, Yelv. 64. 2 Cro. 442. Cro. Car. 38. after a writ of error in the Exchequer Chamber on a judgment in an action of debt.

Supra p. 61.
Hob. 68.
1 Com. Dig. 316.
Vide stat. 4 Ann.
c. 16.

So if a *Venire* be tested the day before issue joined or plea pleaded, it shall be amended, for the roll was the warrant for it. 2 Cro. 64.

So if the teste be the same day with the return, so ruled Mo. (a) 599. 2 Brownl. 102.

(a) Cro. Eliz.
422. S. C.
Cro. Eliz. 781.

So if the teste be upon a *Dies non Juridicus*, as upon a Sunday, as is resolved 2 Cro. 64. Cro. Eliz. 183. Mo. 684. S. C. Cro. Eliz. 203. 2 Cro. 162.

Moore 465. 599.
Cro. Jac. 496.
3 H. Bl. Rep. 9.

Or if it be tested on a day out of term. Cro. Eliz. 203. 467. (b) Mo. 465. S. C. Noy 57. S. C.

(b) Owen 59.
S. C.

So where the return of the *Venire* was not made pursuant to the award on the roll, it was allowed to be amended. Cro. Car. 38. 1 Roll. 200. pl. 50. Ow. 62.

And though it has been adjudged, that where the *Venire* is tested either before the Bill filed, or before the issue, or before the Plea, or after judgment, that this shall be aided by the statute of (a) 32 H. 8. as a misconveying of Process, and that the Court will not intend it to be the *Venire* in the same cause. 2 Cro. 458. (b) Cro. Car. 90. Cro. Eliz. 767. 820. Hard. 321.

PHILLIPS v.
SMITH.

(a) St. 32 Hen.
8. c. 30.

(b) 2 Roll. Rep.
21. Moore 696.
Jenk. 335.

Yet by the other case it appears that it may be amended, and there is no authority to the contrary, that in such cases it shall be aided by the statute of *Jeofails*, and need not be amended; in other cases it is usual to amend Writs by the roll, as where the *Disfringas* omits the day and the place of the assizes, 3 Mod. (c)——*Jackson* ver. *Warren*; so where a *Fieri facias* on a judgment in *Hil.* 27 Car. 2. was tested 27 Feb. 26 Car. 2. it was amended, though the execution might be varied by it, 2 Jones 41. and after the Court had considered of it, it was amended by a rule of Court.

(c) 3 Mod. 78.

Supra. p. 62.

Thirdly, That the *Disfringas* might be amended, for the omission of the word (*Vic'*) was but the misprision of the clerk, for the *Venire* was awarded and directed *Vic' Somerset*, and upon this a Panel of the Jurors was returned; then this Writ of *Disfringas* commanded *quod Disfringas* the same Persons, who were returned upon the Panel annexed to the *Venire*, *ad comparend' apud Westm' nisi Judices Assis' prius apud Taunton in Com' tuo venerint, &c.* which was the same as if the writ had been directed *Vic' Somerset*, for this cannot be directed to any Sheriff but of the same county, and the clerk ought to have made the *Disfringas* agreeable to the *Venire*; for when the prior process goes to the sheriff of *Somerset*, the subsequent process ought to go accordingly. Where a *Venire* was awarded to the sheriff, omitting the county, yet it was amended, for where the Issue arises in a county where the action is brought, the *Venire* ought to be to the sheriff of the same county, and the omission is but a misprision of the clerk. *Yelv.* 69. (d) So where in a *Venire* (*Vic'*) was omitted, as here. Cro. Car. 595. 1 Roll. 205. pl. 12. So where the *Venire* was *Vic' Warwick*, and the

Disfringas

(d) Cro. Jac. 78.
1 Brownl. 202.
Owen. 62. 1
Roll. Abr. 110.
c. 35. Cro. Eliz.
543. Noy 61.

PHILLIPS v.
SMITH.

Diftringas was *Vic' Notting'* which is another county, it was amended. 3 *Mod.* 78. (1) And it was insisted that there is no reason for denying the amendment because this action is founded upon a Penal Statute, for though it is true that the statute 8 *H. 6. cap.* 12. excepts appeals, indictments for treason or felony, and outlawries for the same, and that the Statute 32 *H. 8.* aids only in actions or suits at common law, and the stat. 18 *El. c.* 14. extends not to actions or informations on any popular or Penal statute, and therefore every criminal prosecution is out of the statute of *Jeofails*; yet actions remedial, though founded upon penal statutes, have been allowed the benefit of those statutes; and therefore in an action *qui tam*, &c. upon (a) 31 *Eliz.* for selling horses in *Smithfield* not tolled, it was said that a discontinuance shall be aided by 32 *H. 8. c.* 30. (b) 3 *Lev.* 375.

(a) St. 31 *Eliz.*
c. 12.

(b) 1 *Lutw.*
197. S. C.
Doug. 114.

So in an action *qui tam* upon the statute of usury it was allowed by *Holt C. J.* that the information by the party aggrieved shall be within those statutes, though not common informations. (c) 1 *Salk.* 324.

(c) *Ld. Raym.*
977 *Holt* 209.
6 *Mod.* 33. S. C.

(d) St. 2 & 3
Edw. 6. c. 13.

(e) *Stile* 212.

(f) 13 *Edw. 1.*
St. 2. c. 1. *Hutt.*
56.

So debt upon (a) 2 & 3 *Edw. 6.* was allowed to be amended. *Cro. Car.* 275, 278. 1 *Jones* 302. S. C. 1 *Roll.* 202. pl. 7. 1 *Roll.* 205. (e) pl. 3. So an action *qui tam*, &c. upon the Statute of *Winton*, (f) 1 *Roll.* 203. pl. 12. 1 *Brownl.* 156. and afterwards upon consideration the court allowed the *Diftringas* to be amended.

Fourthly, That the continuances be entered upon the bill which was filed *Pasch. 1 Geo.* and nothing done afterwards till *Trin. 2 Geo.* when the plaintiff declared, and the defendant pleaded to issue, and issue was joined.

For the continuances by the course of King's Bench need not be entered before issue joined, but any time between the issue and the judgment is sufficient; and if they be not en-

(1) It was said by the Court in the case of *Goff* against *Poppewill.* 2 Term Rep. 708. that there was no difference

between civil and penal actions, as to amendments at common law.

tered before judgment, it is the fault of the clerk, which may be amended. 1 *Roll.* 199. *pl.* 27. *Sir Geo. Trencher.* So after error brought. 1 *Roll.* 205. *pl.* 6. And at first the Court doubted, because continuances are the act of the Court which may be amended at any time before judgment, or in the same term that judgment is given, but not after. 8 *Co.* 156. *b.* *Blackmore's case.* *Style* 339. *Friend* *vers.* *Baker.* But after consideration the Court was of opinion that it might be amended, for it appears that continuances may be entered at any time before judgment, and if they are omitted it is the fault of the clerk, which shall be amended before judgment by the common law, 3 *Lev.* 431. and every thing which was amendable before the judgment by the common law may be amended after judgment by the statute of *Jeofails*; and *Pratt* Ch. J. said that they had inquired into the course of the Common Pleas, and were informed that after judgment they were entered of course by the clerk, unless restrained by rule of Court; so they are always amendable of course in the King's Bench.

PHILIPS v.
SMITH.
1 Wils. 303.

[285]

Vin. Abr. Tit.
Amendment.
(P. a.) *pl.* 18.
Barnes 3.

And there seems to be a difference where there is a misentry of a continuance and where the entry is omitted, 8 *Co.* 156. *b.* the continuance was *per Jur. inter B. & C.* (which was between tenant and vouchee) in such a plea *ponitur in respect*, whereas it ought to be *Jur' inter W. & C. quem B. vocavit ad Warrant'*, and it was amended by the Court.

Gillb. Hist. C.
B. ad. Edit. 20.

So *Style* 339. The continuance was from *Pasch.* to *Mich.* leaving out a term.

So *Cro. Eliz.* 618. *Yelv.* 155. where the continuance was given to a stranger, or to one who did not appear.

But the Court agreed it to be amendable when the Continuance was given to one where it ought to be given to two. *Cro. Eliz.* 618.

So after verdict. 2 *Cro.* 211. (a) 2 *Mod.* 316. So con-

(a) *Skin.* 46.
S. C.

tinuances upon a *Fieri facias* or a *Latitat.* 1 *Sid.* 53. 59.

VOL. I.

X

And

PHILIP W.
SMITH.

And upon the general error assigned, exception was taken to the declaration.

[286]

First, Because it is said *quod villa de Iwelcheſter eſt antiquus burgus, & duo burgenſes de tempore cujus, &c. eleſti fuer' & eligi conſuever' per burgen' & inhabitant', &c.* and doth not ſay that it is a borough time out of mind, &c. nor doth it alledge any preſcription in the corporation to ſend burgeſſes. To which it was answered, that where title is not made to the thing itſelf, but to a privilege or liberty within it, it is ſufficient to ſay *quod eſt antiqua civitas, villa, &c.* without ſaying *de tempore cujus, &c.* as where a *Modus decimandi* was alledged for lands in a park, it is ſufficient to ſay *quod fuit antiquus parcus, Hob. 44, 118.* otherwiſe it is if title was made in a *Quo Warranto* to the park itſelf. So if a man makes title to an office, he ought to preſcribe for it, but if he makes title to any thing appendant or incident to the office, it is ſufficient to ſay *Quod eſt antiquum Officium. 10 Co. 59. b. Dyer 71.*

Cre. Car. 500.

In this caſe it is but an inducement to the action, which is founded upon a refusal to deliver a copy of the poll, and the mentioning the title to ſend burgeſſes to parliament is not neceſſary, for it could not be traversed in this action, and therefore it would have been ſufficient if he had begun the declaration *Quod cum per quoddam breve Domini Regis intra Cane' &c.* as in an action for a falſe return upon an election for members of parliament. 1 *Lutw. 82.*

In an action for refusing a poll at an election for bridgmaſter, it was ſaid as here, *Quod Civitas Lond' eſt antiqua Civitas, &c.* and hath uſed time out of mind, &c. to elect two officers called bridgemaſters, &c. 2 *Vent. 25.*

Secondly, It is ſaid *duo Burgenſes eligi conſuever' &c.* but the declaration doth not ſhew that the plaintiff was a burgeſſ of the ſaid borough, and if he was not, he was not qualified to be elected. But it was answered, that the declaration ſaith that a precept was delivered to the defendant, *cui executio &c. pertinuit &c. cujus præcepti prætextu idem def' ad election' duor' Burgenſium*

Burgenfium pro eodem Burgo proceffit quodque; the plaintiff and three others were candidates *ut ex illis duos Burgenfes eligerent*.

PHILIPS &
SMITH.

Thirdly, The right of election is alledged to be *per Burgenfes & inhabitant*’, and it is said *quidam Burgenfes pro quer’ vociferati sunt*, but it does not appear that they were inhabitants. To which it was answered, that it was said *quod quidam Burgenfes in ea parte voces & suffragia habentes*, but it was not necessary to shew how the election was, for the right of election was not in issue.

Fourthly, It is not said that notice was given of the time and place of election.

To which it was answered, that the words in the writ of summons, *Proclamatione facta de loco & tempore prad’*, relate to the election of knights of the shire in the county court, and though the statute (a)—*W. 3.* requires that the officer in a borough, &c. give notice of election, yet it is not necessary in this declaration; it is the duty of the officer, and he shall not excuse himself by his own neglect.

(a) St. 7 & 8.
Will. 3. c. 25.

Fifthly, That it doth not shew any demand of the copy of the poll taken at the time of the election; for it says *Quod requisivit Copiam &c. de eadem Electione capt’*, which might be, though it was not taken at the time of the election.

To which it was answered, that it is expressly said that he took the poll at the election, *quod post prad’ capitum numeration’ Anglice poll suffragan’ de in & pro Electione illa capt’*, the plaintiff *requisivit Copiam suffragan’ de eadem electione capt’* and no other poll is mentioned, therefore it is necessarily to be intended that the demand was of a copy of the poll taken at the same election.

Sixthly, That there was no tender of any sum certain for the copy of the poll, but that the declaration only says that the plaintiff *parat’ fuit & obtulit ad solvend’ Def’ aliquam rationabilem denarior’ summam pro scriptiōe inde quam ipse requireret*.

[288]

That in pleading a tender of amends they ought to tender a sum certain, and shew the sum tendered, for an officer cannot

PHILIPS v.
SMITH.

cannot demand any sum, for if he demands more than is reasonable he will be liable to be indicted for extortion, and therefore it would be unreasonable to subject the officer to it.

Vin. Abr. Tit.
Tender (Q.)
pl. 20.

To which it was answered, that the words of the statute are *paying only a reasonable charge for writing thereof*, and therefore the officer shall give the charge, and make a demand of what he thinks reasonable before the plaintiff can pay it; and it would be impossible for the plaintiff to tender any thing certain before he has the copy, for the charge varies according to the difficulty and length of the writing, and the plaintiff cannot put a price upon another person's labour. This clause was designed for the benefit of the officer, and therefore he ought to do the first act, and make a demand before the plaintiff can know what he ought to pay; and if it be a condition precedent, then it shall be intended that it was proved that he did all that was necessary for him to do to maintain his action, otherwise there could not have been a verdict for him. And the Court made no difficulty as to any of the objections, but with regard to the tender; but upon talking a little together, they agreed that the tender was good, for till the officer demands something, or delivers a copy of the poll, the party cannot know what to tender. As where there is a demand of a copy of a commitment, &c. upon the statute 31 Car. 2. it is only necessary to say that he was ready to pay for it; and the judgment was affirmed by all the judges, and afterwards it was affirmed in parliament.

D E

Term. Sanct. Mich.

5 Geo. I. In C. B.

White *vers.* Collins.

Case 154.

A writ of false judgment was brought upon a judgment in ejectment given in the court of *Havering atte Bower in Com' Essex*, being a court of ancient demesne of the manor of the King, in which *White* declared on the demise of *Carew Harvey*, alias *Mildmay*, for one messuage, one barn, one garden, one orchard, forty acres of land, forty acres of meadow, and fifty acres of pasture, with their appurtenances, in *Hornchurch infra jurisdiction' Cur'*; upon not guilty pleaded, at the trial the jury by consent found a special verdict to this effect:

A limitation to one to take and enjoy the profits of an estate during his life, and after his decease to the heir male of his body, would make an estate-tail where nothing appears which explains the testator's intent to the

contrary; otherwise not. 2 Eq. Abr. 313. pl. 19. S. C. Via. Abr. Tit. *Dévoise* (B. b.) pl. 19. Com. Dig. Tit. *Dévoise* (N. 5.) Robinson's Gavelkind. 96. Ambl. Rep. 453. Harg. L. Tracts, 505. Fearne's Con. Rem. 4th Edit. p. 234.

'That *Francis Harvey*, al' *Mildmay Esq.* was seised in fee of the lands in question, (which were the ancient demesne of the Crown) and by his will dated the 26th of *July* 1701. devised to his eldest son (who was lessor of the plaintiff) two fields for life, and after his death, *I give those two fields to the heir male of his body lawfully begotten, during the term of his natural life; and after the death of such heir male, I give the said fields, and all the lands and tenements not sold by my executors and trustees, to my son Francis Mildmay during his life; and to the heir male of his body lawfully begotten, during the term of his natural life; and for want of such heir male, I give those two fields and all my lands not sold, &c to my son Carew Mildmay, during his life; and after his death, to the heir male of his body lawfully begotten, during the term*

[290]

WHITE v.
COLLINS.

of his natural life; and for want of such heir male, I give the said fields and lands amongst all my daughters which shall be alive at my death.

And by another clause in the said will he devises the lands in question by these words, (*viz.*) *I give to my son Frank Mildmay my farm called East-House Farm, &c. to enjoy the rents and profits thereof during the term of his natural life; with power to make a jointure of all or part if he should marry; and after his death and jointure, if any be made, to the heir male of his body lawfully begotten, during the term of his natural life; and for want of such heir male, I give the said farm to my son Carew Mildmay, during his life; and after his death, I give it to my grandchild Carew Mildmay, during his life; and afterwards he gave it to his grandchildren Edward and Richard Mildmay, equally to be divided.*

The Jury further found, that the testator died leaving *Carew Mildmay* his eldest son, and *Francis* his second son; that the eldest son, at the time of the will made and at the death of the testator, had issue *Carew, Edmund* and *Richard*, but *Frank* the second son was not married, nor had any issue; that *Frank Mildmay* entered, and by deeds of lease and release dated the 9th and 10th of *July* conveyed the said lands, called *East-House Farm*, to *Robert Coleman* and his heirs, to make him tenant of the freehold, against whom a common recovery might be had, to the use of *Frank Mildmay* and his heirs; and afterwards, at the court for the manor of *Havering atte Bower*, on the 22d of *July*, upon a writ of right close tested the 23d of *January* a recovery was suffered, in which *Frank Mildmay* was vouchee, who afterwards by his will dated the 8th of *March*, 1714. devised the said lands to his younger brother, &c. and died; the younger brother entered and was seized *prout lex postulat*; upon whom *Carew Mildmay* the lessor of the plaintiff entered, and demised to the plaintiff; and if, &c.

The common error was assigned, and the principal question upon this special verdict was :

If by this devise to *Frank Mildmay* he was tenant in tail, or for life only?

WHITE &
COLLINS.

For if he was only tenant for life, his recovery is of no avail, and the lessor of the plaintiff will have a good title; but if he was tenant in tail, his recovery has barred, or at least discontinued the remainders limited by his father's will, and then the lessor of the plaintiff has no title or entry. I held, that the common recovery barred the intail. *Kit.* 97.

I argued, that by this devise of *Francis Harvey*, al' *Mildmay*, his son *Frank Mildmay* had an estate-tail; and for the better apprehending this, it will be necessary to consider the words of the devise.

If the devise had been, *I give to my son Frank Mildmay, and to the heir male of his body*; this would without question have been an estate-tail, though the word *Heir* is *Nomen Collectivum*, and comprehends all the heirs which shall descend from his body; and so it was agreed by all the justices in the case of *Clark ver. Day, Cro. Eliz.* 313. (a) *Owen* 148. though in the principal case there the court was divided.

The word *Heir* is *Nomen Collectivum*. 1 Vent. 215. 1 Roll. Abr. 832. K. pl. 1. 1 Burr. 40. 49. 1 Str. 14. (a) Moore, 593. 1 Roll. Abr. 839. 1 Raym. 205. Fitz. 24.

In a conveyance at common law those words make an estate-tail. *Co. Litt.* 22. a. (1) cites the case 39 *Aff.* 20. where the grant was to baron and feme & *uni hered' de corpore suo procreat'*, & *uni hered' tantum*, &c. In an assise brought by the donor against the heir, who pleaded their grant in bar to the assise, the plaintiff insisted, that the baron and feme had but an estate for life; but it was held by all the justices, that the plaintiff had no cause of assise, and was nonsuited.

Fearne's C. R. 4th edit. p. 281. Ambler's Rep. 457.

So *Reg. Jud.* 6. a *Scire facias* was brought to execute a fine by the heir of him in remainder, where the estate was rendered to *R.* for life, and after his death to *G.* and the heirs of his body, & *si obierit sine hered' masculino de corpore suo procreat'*, remaneret to his brother *J.* & *hered' masculino de corpore suo*, &c.

Co. Litt. 22. a. Fearne's C. R. 281. 3 Com. Dig. 219.

(1) In *Coke Littleton*, fol. 8. b. we find an opinion directly contrary to the above.

WRITE V.
COLLINS.

There is no necessity to cite cases to prove that the word *Heir* is *Nomen Collectivum*, many are mentioned in 2 *Roll. Abr.* 253.

Secondly, if the words of the devise had been, *I give to my son Frank, and to enjoy the rents and profits thereof during the term of his natural life, with power to make a jointure of all or part, if he should marry; and after his death and jointure, if any be made, to the Heir Male of his body lawfully begotten*, without saying any thing more, this would have been an estate-tail.

If there be a devise to a man for life, and after his death to the heirs of his body, it is fully agreed by the law-books, that this makes an estate-tail. In *Wild's* case, as reported by *Mo.* (a) 397. *Popham* says, that if there be a devise to a man for life, and afterward to his heir male, this makes an entail; and cites a case (b)—*Bend. 4 Eliz.* where it was adjudged, that a devise to one for life, and after his death to the men-children of his body, was holden an estate-tail.

Sandys's case, 9 *Co.* 127. b. was this, *Merrick* seised in fee, and having five sons, *William, Samuel, Thomas, Richard* and *Daniel*, devised to his wife for life, and after her death his son *William* to have it; and if his son *William* marry, and have any male issue, &c. then his son to have the house; if he have no male issue, &c. to his son *Samuel* in totidem verbis; and if *Samuel* have no issue male, then his son *Thomas* to have the house; if *Thomas* marry, having a male issue of his body lawfully begotten, then his son to have the house after his decease; if he have no male issue, then to *Richard*, and then to *Daniel* in the same words; and if any of his sons or their heirs male, issue of their bodies, go about to alien, &c. the next heir to enter, &c. *William* and *Samuel* die without issue male; and it was adjudged, that *Thomas* had an estate-tail; and therefore his recovery good, though the limitation was, if *Thomas* marry having a male issue, in the singular number, and though it was said that such son (not issue) shall have it after his death; for upon the whole of the words it appears that *Richard* was not to have it, but in default of issue male of *Thomas*.

A man

(a) 1 Eq. Abr.
181. pl. 15.
6 Co. 16. b.
Powell on Dev.
504.
(b) Old. Bendl.
30. 1 Bulst. 219.
1 And. 43. Poll.
108. Dougl. 433.
3 Com. D 8. 27.
Bridg. 137.
Intra p. 374-
426.

A man devises to R. his eldest son for ever, and after his death to the heir male of his body for ever, & *pro defectu talis heredis masculi* (all in the singular number) to E. his other son for ever, (for the book is wrong printed, *eldest son*, whereas it ought to have been *other son*) adjudged by this devise R. had an estate-tail, not for life only. *Trin. 11 Jac. B. R. Welkins versus Whiting, (a) 1 Rol. Abr. 836. pl. 11.*

WHITE &
COLLINS.

And it was adjudged without any difficulty, that a devise to A. for life, upon conditions mentioned in the will, and after his decease to the use of the heirs of his body, makes an estate-tail in A. though limited to him expressly for life only. *Hil. 18 & 19 Car. 2. C. B. Rundall vers. Eely, Cart. 171.*

(a) 1 Bullst. 219.
Fearne's C. R.
279.
1 Burr. 38.
3 Atk. 736.
2 Vca. 225.
S. C.
1 Lutw. 824.
2 Salk. 679.
Fearne's C. R.
242.

The case of *King and Melling, 24 Car. 2.* is stronger; *Robert Melling* devises to his son *Barnard Melling* (who had then a wife named *Elizabeth*) for life, and after his death in these words, (*viz.*) *I give the same to the issue of his body lawfully begotten on the body of any second wife he shall happen to marry, and for want of such issue, to my son John Melling and his heirs, provided Barnard may make any such second wife a jointure which she may enjoy for her life*; in this case it was strongly urged, that the devise being to *Barnard* expressly for life with a power to make a jointure, that issue being a good name of purchase, comprehending all the issue of the second marriage, to which the testator appears to have an equal regard, and that they should all take; if it be taken to be a name of purchase, *Barnard* by this devise shall take only an estate for life with contingent remainder to the issues of the second marriage in tail; remainder to *John Melling* in fee; and in the King's Bench two Judges were of the same opinion, and *Hale C. J.* said, that at first he was of the same opinion, but upon great consideration of the case, and the consequences of it, and on a thorough examination of the will and the authorities, he held that *Barnard* had an estate-tail, and so it was resolved by all the Judges in the Exchequer Chamber upon a writ of error. *1 Vent. 225. (b) 2 Lev. 58. Poll. 101.*

[294]

(b) 3 Salk. 296.
3 Keb. 42, 52.
95. 1 Eq. Abr.
181. pl. 14. S. C. *Infra p. 429.*

And

WRITE V.
COLLINS.
Robinson's
Gavelkind, 95.

And *Ventris* (2) 230. says that C. J. *Hale* in his argument cited *Buckley's* case 43 *Eliz.* where there was a devise to *A.* for life, remainder to his next heir male, and in default of such heir male, remainder, to another; adjudged that *A.* had an estate-tail; and *Vent.* 232. says he also cited the case of *Hansfey* versus *Lowther*, adjudged in 1651, where a copyholder surrendered to the use of his will, and thereby devised it to his eldest son for life, and after his decease to the heir male of his body, &c. Resolved, that the son had an estate-tail.

This last case seems to be the same as is mentioned 2 *Roll. Abr.* 253. pl. 4. between *Pawsey* and *Lowdell, Pasch.* 1651, and reported by *Style. (a).*

(a) *Style* 249.
273. 2 *Roll. Abr.*
794. pl. b.

Roll says that the devise was to *B.* for life, and after his death to the heir of his body begotten for ever, and that it was resolved to be a fee executed in *B.* but by *Style* it appears to be resolved that it was an estate tail, and so it is cited *Poll.* 108.

By all these cases it appears that if there be a devise to one for life and after his death to the heir, issue or children of his body, this makes an estate-tail, as well as if it had been limited to him and the heir or issue of his body, directly, without the words *for life or after his decease*; that if the limitation be to the heir male of his body in the singular number, it has the same effect as if it had been to the heirs male, &c. in the plural number.

And by the resolution in the case of *King* versus *Melling*, it appears that a power to make a jointure makes no difference, for as *Hale* says *Vent.* 232. tenant in tail cannot make a jointure out of his estate without discontinuing, or merging or destroying the estate-tail. But in the present case, to inforce

a *Salk.* 679.

(2) I have been unable to discover the author by whom this case is reported, and I apprehend there is some mistake in the reference, as Lord *Hardwicke* in the case of *Lethieullier* versus *Tracy*, 3 *Atk.* 796. *Amb. Rep.*

223. declared that the report of *King* versus *Melling* in *Ventris* was very imperfect, "especially as to the cases said to have been cited by *Hale*." *Dough.* 433. in note.

this

this construction, that the testator intended his son *Frank* an estate of inheritance, and not an estate for life only, I must observe that the words are not, *I give to my son Frank my farm called East-house Farm, for his life, but I give to my son Frank my farm, &c. to enjoy the rents and profits thereof during the term of his natural life, with power to make a jointure, and after his decease and jointure, to the heir male of his body, &c.* Therefore the words *I give*, which begin the sentence, govern the whole clause; the bequest or gift is not made to the heir male after the death of the father, but only to the father and his heir male. The heir male cannot take by any substantive clause of devise to him, but only by virtue of the devise to his father; and then the words *to enjoy the rents and profits during his life*, do not import that the testator intended him only an estate for life, but that the testator took notice of the effect and consequence of the estate by him devised; he gave this farm to his son *Frank*, and the heirs male of his body with power to make a jointure; in consequence of which devise, his son must enjoy the rents and profits during his life, the jointress after him, if any jointure be made, and after the death of the father and jointress the heirs male; this seems to be the obvious construction and intent of the words, and the words, if there is occasion, may be transposed to support the intent.

Secondly, It is to be observed that the limitation is to his son *Frank* and the heir male of his body lawfully begotten, which is the usual phrase and expression in limiting an estate-tail, and gives some ground to imagine the testator had such an estate in his intention.

Thirdly, The limitation is to the heir male of the body of *Frank*, and in limitations by will it is material to observe from whose body the heir who is to take, is to proceed, in order to the better determining in whom the estate-tail is to be fixed; for where the limitation is to one and the heirs of his body generally the estate-tail vests in him, for the rule laid down *Co. Lit. 22. b.* that where the ancestor takes an estate for life,
and

WHITE v.
COLLINS.

and afterwards there is a limitation to his right heirs, the heir shall not be a purchaser, obtains in the construction of wills.

If a feoffment be made, or a fine levied, or recovery suffered to the use of *B.* for life, and after his decease to the heirs of the body of *B.* to be begotten; remainder to *D.* in fee; *B.* takes an estate-tail executed in himself, and the heir of his body cannot take by purchase; so in a will, if a devise be to one for life, and afterwards a limitation of the same estate is made to his right heirs, or to the heir, or heirs of his body, or issue, or children of his body, the father shall have the whole estate, and his heir or issue shall take by descent, and not by purchase.

Fourthly, It is to be observed, that the limitation by the testator to his eldest son was in default of such heir male, the devise was to *Frank* and to the heir male of his body lawfully begotten; and therefore when the devise over to the eldest son is for want of such heir male, it is tantamount to saying, *and for want of heir male of the body of my son Frank lawfully begotten, I give the said farm my son Carew Mildmay*, which shews apparently the intent of the testator that *Carew* should not take while there was any issue of the body of *Frank*.

These words of themselves are sufficient to create an estate-tail, as *Hale* observes *Vent.* 230. and for that purpose cites *Robinson's* case 4 *Jac.* where a man devises to *A.* for life, and if he dies without issue, then he devises over; it was resolved that *A.* took an estate-tail, which seems to be the case mentioned in 1 *Roll's Abr.* 837. pl. 12. *Moore* 682. (a) *Robinson* versus *Miller*, in *B. R.* though there it is said to be *Trin.* 7 *Jac.* and is there more restrictive; if a man devises to his wife for life and afterwards to his son for life, and if he die without issue, having no son, that *B.* should have it. Resolved that the son took an estate in tail male.

(a) 2 Brownl.
271. D. C.

The latter words then are to be considered, (*viz.*) *during the term of his natural life*, if these make any difference in the construction of the will, *I give to my son Frank, and the heir male of his body lawfully begotten, during the term of his natural life, and for want of such heir male, I give the said farm to my son Carew, &c.*

If

If *Frank* took an estate tail, then his heir male (when it descended to him) would also take an estate in tail, and his estate would not determine with his life.

And that he did take an estate-tail, besides the reasons and authorities before mentioned, may be collected from the general intention of the testator, who takes notice, that *Frank* had no issue, nor was married, and therefore provides for him that he may make a jointure, and provides for the issue male of that marriage ; but such provision would be defective if he provided only for one of such issue, and for him only for life ; *all the sons of Frank and their descendants* require a provision ; and it seems more agreeable to the design of the testator, that all should be the objects of his care.

It will be also more agreeable to his expressions in other parts of the will, for as to another clause in the will, it is found by the special verdict, that the testator gives to his son *Carew* two fields for his life ; and after his death, I give those two fields to his heir male of his body lawfully begotten, during the term of his natural life ; and after the death of such heir male, I give those fields and all my lands not sold, &c. to my son *Frank*, during the term of his natural life, and to the heir male of his body lawfully to be begotten during his life ; and for want of such heir male, I give those fields and lands to my son *Carew* for life, and to the heir male of his body, &c. during his natural life ; and for want of such heir male, to his daughters.

By which clause, though the inaccuracy of the testator appears, and though the words *heir male of his body lawfully begotten* are used for the designation of any son of *Carew*, who should be his heir after his death, yet it is apparent, first, that he makes a distinction in the use of the same phrase ; for his intent appears to be, that *Carew* should have the two fields for his life, and his eldest son (whom he afterwards takes notice of in his will by name,) should also have them after the death of his father for life ; that *Frank* should have the other lands not sold by his executors (except the two fields) imme-

WHITE v.
COLLINS.

diately after the death of the testator, and the two fields also after the death of *Carew* and his eldest son, to him and the heirs male of his body; and that in default of such issue the two fields, and the other lands not sold, should go to *Carew* and the heirs of his body, and for want of such issue to the daughters of the testator: And therefore the two fields intended for *Carew* and his eldest son for life are limited, and *after the death of such heir male*, not *for want of such heir male of Frank*, which shews that he made a difference between those expressions; the two fields are devised to *Carew* for life, then to his heir male, (which was *Carew* the grandchild of the testator for life, and after his death to *Frank*; and for want of an heir male of *Frank* to *Carew* again; by which it appears, that that there was a manifest difference (according to the testator's apprehension) between the words, *after the death of such heir male*, and the words, *for want of such heir male*, for the phrase, *for want of such heir male*, imports *failure of issue male*. And this is the more evident, because after the failure of issue male of *Frank*, and failure of issue male of *Carew*, he devises all the lands to his daughters; and for the same reason the words *heir male of his body begotten*, applied to the son of *Carew* who was then *in esse*, are *designatio personæ*; and *heir male of the body of Frank to be begotten* are words of limitation.

But if in this clause the disposition to *Frank* for life, and after his decease to the heir male of his body lawfully to be begotten for life, and for want of such heir male to *Carew*, &c. make an estate-tail, as it must, unless we suppose, that he disposes of all his lands to his daughters before failure of his issue male, then *de congruo* the same words shall have the same construction in the clause which devises the lands in question.

[299]

But then the question remains, what the testator intended by these words, *during the term of his natural life*? it may be, the testator having used that expression in the beginning of the disposition of his lands, was of opinion, that the repetition of them was necessary to each limitation; or as Lord

Hale

Hale said, 1 *Vent.* 232. perhaps the testator apprehended, that the devisee had but an estate for life, (for tenant in tail has only an estate for life in many respects,) or intended that each devisee should have only an estate for life; but his intention was inconsistent with the rules of law; and in wills where words are added inconsistent with the estate which the testator has devised, they shall be rejected. In all cases where there is a devise to one for life, and after his death to the issue or heirs of his body, the words *during the term of his life* shall be rejected.

WHITE &
COLLINS.

In all languages and authors it is frequent to find words which are abundant, and cannot be taken into the construction consistent with the scope and design of the Author; it is therefore less to be wondered at that it should be so in wills, where the testator is *Inops Concilii*, and by reason of his infirmities many times cannot attend to the accuracy of the expression; and therefore there are frequent instances of this nature, where some words are to be past by or rejected.

In the case of *Newton and Bernardine, Mo.* 127. in an action of debt for rent, the case appeared to be this: Infra p. 374.

Cosham having issue *Thomas, Richard* and *Gilbert*, devised twenty Nobles to the child of *Thomas* (who was dead, and his wife *ensient*) for twenty years; and if my son *Richard* die before he hath any issue of his body, so that my land descend to *Gilbert* before he come to twenty-one, my executors shall occupy it till *Gilbert* come to twenty-one years of age. Resolved, that *Richard* had an estate-tail; for the words *before he hath any issue* are tantamount to *without issue*, and then the subsequent words cannot prejudice.

So *Tilley* versus *Collier* (a,) 2 *Lev.* 162. *Remnant* having three daughters, *Susan, Anne* and *Elizabeth*, devises his lands to his wife till his heir be twenty-one, and gives 740*l.* to *Anne* and *Elizabeth*, and if *Susan* his heir die without heirs before twenty-one, so that the lands come to *Anne*, her portion shall go to *Elizabeth*. Adjudged that *Susan* had an estate-tail, and that the words *before twenty-one* should be rejected.

[300]
(a) 3 *Keb.* 589.
S. C.

WHITE v.
COLLINS.

(a) 2 Brown.
103. S. C.
2 Bulst. 131.
1 Roll. Abr. 741.

So if lands be devised to *A.* and the heirs male of his body during the term of 500 years, it shall be an estate tail in *A.* and the words *during the term of 500 years* shall be void; (a) *Lovece* versus *Goddard*, 2 Cro. 62. Mo. 772. It is true, that *Croke* says, that *Anderfon* and *Warburton* held the words *for 500 years* to be void; but *Daniel* and *Walmsly* held the words not merely void, but to have such a construction, that the estate-tail should cease on the expiration of the 500 years; yet *Moore* says, that it was agreed by all the justices, that the limitation for years was void. A writ of error was brought on this judgment, and the first judgment reversed, which is reported 10 Co. 78. And though it is there said, 10 Co. 87. that the Chief Justice held, that this was a devise of a term for years, and not of an inheritance; to which *Wynch* agreed, and that the term determined on the dying without issue: there is no resolution given by the Court upon this point, being controverted between the Judges of the Common Pleas and the King's Bench, in the first cause upon the same will; the difference seems to be, that some of the Judges would transpose the words to make all consistent, and then it would be a devise for 500 years, if *A.* and the heirs male of his body should so long live; but all the Judges, who took the intention of the testator to be to give an estate-tail, held, that the words *during the term of 500 years* should be rejected.

But in the present case, the words *during the term of his life* cannot be transposed consistently; for they cannot receive a construction with any propriety, except where they are placed by the testator; and there, if the prior words grant an estate-tail, they ought to be passed by as of no efficacy.

[301]

This case was afterwards argued by Serjeant *Selby* for the plaintiff in error, and by Serjeant *Chefbyre* for the defendant, Pas. 5 Geo. 1. and the judgment was affirmed by the Court; for it was agreed, that the limitation to *Frank* to enjoy and take the profits during his life, and after his decease, to the heirs male of his body, would make an estate-tail; so if it had been, to the heir male of his body, in the singular number, where nothing appeared which explained the intent to

Fearn's Cont.
Rem. 4th edit.
280.

the

WHITE v.
COLLINS.

the contrary; but here the intention appeared to be, that such heir male should have the lands only for life, which shews that the testator did not intend that those words should be taken as words of limitation; and nothing appears in the nature of the expression, which imports that they should be taken so.

Heir male or *next heir male* (which are words of the same import, for a man cannot be heir male, if he be not next heir male) are words of purchase. In *Archer's* case, (a) 1 Co. 66. b. the devise was, to his right and next heir male, and though there his son was then *in esse*, that made no difference, for if he had not had a son *in esse*, it would have been a contingent remainder; if he had one, it was a remainder vested. But the reason, upon which it was resolved in *Archer's* case, that the devise to *Robert Archer* for life, and after his decease to his right and next heir male and the heirs male of his body, was not an estate-tail in *Robert Archer*, but only an estate for life, with remainder to his son in tail, was, that the words of limitation being added to the devise to his next heir male, shews that he did not intend the words *next heir male* as words of limitation, but as a description of the person who was to take in remainder; and therefore in this case, where the devise is to *Frank*, and after his decease to the heir male of his body during his life, the express limitation during his life, shews that he intended his son should have it in remainder for his life only; and there seems to be no difference between their case and *Archer's* case; and when he devises it over for want of such heir male to *Carew Mildmay*, &c. this does not import that *Carew* should not have it till *Frank* died without heirs male generally, but for want of such heir male who was to have it for life.

(a) 2 And. 37.
Co. Elis. 453.
1 Eq. Abr. 182.
Pl. 16. B. C.

[302]

Case 155.

Newland *vers.* Collins. In C. B. (1)

The inducement to a traverse is insufficient, where the traverse is a thing immaterial. / Vin. Abr. Tit. Traverse (B) pl. 6. 5 Com. Dig. 114.

THIS was an action of replevin. The defendant avows, for that *Thomas Collins* his father was seised in fee, and being so seised on the 24th of *May* demised to the plaintiff for twenty-one years, to commence after *Michaelmas* then next ensuing, at the yearly rent of 8*l*.

That *Thomas Collins* on the first of *December* 1710. died seised of the reversion, which descended to the defendant as his son and heir, who for rent arrear avowed, &c.

The plaintiff in bar to the avowry said, that *Thomas Collins* was seised in tail, *absque hoc, quod fuit seisis in dominico suo ut de feodo*. To which the defendant demurred, and shewed for cause, that the traverse was a thing immaterial, and the inducement to the traverse insufficient; and it was understood to be agreed, that the plaintiff might traverse the title alledged by the avowant, though he need not alledge such title to maintain his avowry. *Dy. 365. 2 Cro. 44. (a). Yel. 54. S. C. 2 Cro. 681.* But then there ought to be a proper inducement to the traverse, to shew that the matter contained in the traverse is material, for though the inducement to the traverse is not traversable generally, yet it ought to be such as, if true, will defeat the title of the other party, otherwise the traverse amounts to a negative pregnant. *Hob. 321.* And therefore in a prohibition, where the plaintiff suggests that the Prior, &c. was seised in fee, and insists upon the unity of possession time out of mind till the dissolution 31 *H. 8. ratione cuius* he was discharged of tithes; the defendant pleads, that by agreement made on the first of *May* 1422:

(a) 1 Brownl. 183. S. C.

5 Com. Dig. 117.

5 Com. Dig. 121.

Cro. Car. 265.

(1) By the stat. 11 Geo. 2. c. 19. s. 22. it is enacted, that it shall be lawful for all defendants in replevin to avoid or make consuance generally, that the plaintiff in replevin, or other tenant of the lands and tenements whereon the distress was made, enjoyed the same under a grant or demise at such a certain rent, during the time where-

in the rent distrained for was incurred, and still remains due; or that the place where the distress was taken was parcel of such certain tenements, held of such honour, lordship, or manor, &c. without further setting forth the grant, tenure, demise, or title of landlord lessor or owner of such manor. *Gillb. Hist. 2d. ed. p. 139.*

between the master of the hospital of *Burton Legars* and the Prior, that tithes should be paid in the hands of the tenants, &c. *absque hoc*, that he was discharged of tithes.

NEWLAND &
COLLING.

It was holden that the inducement to the traverse was bad, for it did not shew any title which the master of the hospital had to make such an agreement; and to the same purpose are the cases *Gro. Car.* 335. (a) *Dyer* 366. (b) 6 Co. 24. 2 *Cro.* 681.

[303]

(a) 1 Jones 327
S. C.

(b) Moore 574
pl. 792. S. C.

And therefore here, though *Thomas Collins* the father was seised in tail only, yet his lease might be good, especially where the son being the issue in tail, has affirmed it by his distress and avowry for the rent.

Supra p. 120.

Bishop *vers.* Brooks. In C. B.

Case 156.

THIS was an action of debt upon a bail bond given by the defendant to the sheriffs of *London*, for the appearance of *Humphry Evans* at the suit of the plaintiff, and which upon the forfeiture was assigned by the sheriffs to the plaintiff, according to the statute of 4 & 5 *Ann. c.* 16. (a) And the plaintiff in his declaration declares, that the defendant by obligation *concessit se teneri*, &c. to the sheriffs *sub cond' quod si grad' Humph. Evans compareat*, &c. *quod quidem script' obl' capt' fuit virtute Stat. 23 H. 6. c. 10. Virtute brevis de cap' ad respond' quer'*, &c. but does not say that *Evans* was arrested by force of the said writ. The defendant pleads *Non est factum*; and after a verdict for the plaintiff, it was moved in arrest of judgment, that by the Stat. 4 & 5 *Anne* it is said, if any person shall be arrested after the first day of *Trin.* term by any writ, &c. out of any of her Majesty's Courts of Record at *Westminster*, at the suit of any common person, and the sheriff take bail from such person, &c. the sheriff at the request and costs of the plaintiff shall assign to him the bail-bond, &c. and therefore it ought to appear that the defendant was arrested, otherwise the sheriff has no authority to assign the bail-bond, for by common law it was not assignable, being only a *chattel in action*, and therefore when the statute enables it to be as-

Upon *Non est factum* pleaded to a bail-bond, the defendant admits all other matters against him, and depends upon that for his defence. 5 *Com. Dig.* p. 59. (a) *St. 4 Ann. c. 16. l. 20.*

BISHOP v.
BROOK.

[304]

signed if any person be arrested, &c. it ought to appear by the declaration that he was arrested, otherwise the action fails, and this shall not be aided by a verdict upon *Non est factum*, because this matter could not be tried upon such an issue.

To this I answered, that the intent of the statute 4 & 5 *Anne* was, that all bail-bonds in personal actions should be assignable, and by the statute 23 *H. 6. c. 10.* the sheriffs had authority to take bail of all persons by them arrested, or being in their custody, by force of any writ, bill or warrant in any personal action, or by cause of indictment of trespass. And the statute 4 & 5 *Anne* does not mean that bail-bonds taken upon a *Capias* on indictments should be assignable; yet all the bonds taken of bail in personal actions were intended to be assignable; but by the statute 23 *H. 6.* the sheriffs had no power to take bail but of persons arrested by them or in their custody (that is in arrest by their predecessors); and therefore the declaration, which says that the bail-bond was taken by force of the stat 23 *H. 6.* and which was upon a *Capias* against *Evans* at the suit of the plaintiff, imports, that *Evans* was arrested by the sheriff at the suit of the plaintiff, for otherwise he could not take a bail-bond for his appearance by force of that statute, and therefore there the averment that he was arrested is sufficient. Upon demurrer perhaps it might be made dubious, but here, after *Non est factum* pleaded, the defendant has admitted all other matters against him, and depends upon this for his defence.

If the defendant had pleaded *Nil debet*, it ought to be plainly proved on the trial, that the defendant gave the bail-bond, that *Evans* was arrested upon a *Capias* against him, upon which such bail-bond was given to the sheriff, and afterwards assigned to the plaintiff, and upon this declaration such proof was necessary, and therefore upon *Nil debet* pleaded, after a verdict for the plaintiff he should have his judgment; for the imperfection of the declaration is aided by the verdict, because the arrest must be proved; so for the same reason when the defendant waives the general issue *Nil debet*, upon which the special matter might be proved, and relies upon this that
the

the bond was not his deed, he allows all the other matters against him; as in an action of covenant, if a breach is not well assigned, and the defendant pleads *Non est factum*, he admits a breach, and after a verdict that it was his deed, judgment shall go against him. 2 Cro. 369. *Mussett versus Ballett*.

BISHOP v.
BACON.

[305]

So in an action upon a bond with condition to stand to an award, tho' the plaintiff generally ought to assign a breach in his replication; yet if the defendant after *Oyer* pleads *Non se submitit*, and that is found against him, the plaintiff shall have judgment though no breach appears. Resolved, 1 Sid. 290. (a) admitted *Lutw.* 528. *Yelw.* 78. (b)

(a) 1 Keb. 73.
S. C.
(b) 1 Browl.
39. 2. C.

So in an action for an escape brought by a plaintiff *Durante minoritate H. Stanhope*, if the defendant pleads a removal by *Habeas corpus* and a commitment to the *Fleet*, and that matter is traversed, the defendant cannot afterwards take an exception that the plaintiff had not alledged *H. Stanhope* to be within 17 years of age, for he has admitted an authority in the plaintiff to sue. *Lutw.* 627, (c) 632.

(c) 1 Raym. 408.
605.
Cro. Car. 240.
Yelv. 128.
Hob. 251.
2 Sid. 60.

There is a difference where the plaintiff by his declaration shews something which discovers that he has no cause of action, and where he only omits that which was to maintain his action; in the first case the declaration shall not be aided by reason of the bar, in the other case it shall.

After consideration, the Court gave judgment for the plaintiff; for the defendant by his plea of *Non est factum* has relied upon this particular matter; and this being found against him the plaintiff shall have judgment.

Hedgethorn *vers.* Thurlock. In C. B. Case 157.

THIS was an action of debt upon a judgment in the Court of Common Pleas, and the declaration was *Effex, scil.*, tho' the judgment was at *Westminster*, and therefore the action ought to have been brought in *Middlesex*.

The Stat 4 & 5
Anna, does not
give any remedy
upon demurrer,
but in matters
of the same na-
ture with those

which are there specified. Vin. Abr. Tit. *Demurrer*. (T.) pl. 9.

Y 3

Upon

HEDGETHORN
v. THURLOCK.

Upon a general demurrer to the declaration it was urged, that this shall be aided by the statute 4 & 5 *Annæ*, c. 16. which enacts that the Judges shall proceed to judgment according to the very right of the action, notwithstanding any default, omission or defect, &c. But the laying of the action in a county where it ought not to be laid goes only to the form and course of proceeding, not to the right of action, it is a matter proper to be alledged in abatement of the writ, and by Common Law could not be pleaded in abatement in debt in this case, for *Debit' et contract' sunt nullius loci*, and though by the statute 6 R. 2. c. 2. in debt, &c. if it appears by the declaration that the contract was made in another county the action shall abate; yet this is but for convenience; and if a bond be given or debt arises in *Middlesex*, and an action is brought thereupon in *Essex*, the Court shall not examine where the action arises, though in the time of H. 6. it was done; and if the defendant pleads that the obligation was entered into in *Middlesex*, it will not be a good plea, for if the plaintiff demurs to it, by which the fact is confessed, yet the plaintiff shall have judgment, *All. 17*, because it appears that this doth not go to the right of the action, for then judgment would be for the defendant; if a trial had been in this case by a jury of the county of *Essex*, it would have been good after a verdict; yet the statute 16 & 17 *Car.* 2.

(a) St. 16 & 17
Car. 2. c. 8.
made perpetual
by Stat. 22 & 23
Car. 2. c. 4.
2 Ld. Raym.
1393.

(a) aids only such defects as do not hinder the Court from giving judgment according to the right of the action. *Sed non allocatur*. For the Stat. 4 & 5 *Annæ* does not give any remedy upon demurrer, but in matters of the same nature with those which are there specified. Judgment was given for the defendant; but the plaintiff was afterwards allowed to discontinue upon payment of costs.

Moore *versf.* ———. In C. B.

Case 158.

THIS was an action of *Assumpsit*. The defendant pleaded in disability of the plaintiff, that he was a recusant convict, and says, that the plaintiff was summoned to appear at such a day and place to take the oaths before the justices of the peace according to the statute; (a)

In a plea of disability of the plaintiff, that he was a recusant convict, that he did not take the oaths at the quarter-sessions; it is not enough

to say *Et hoc parat' est verificare*, unless he adds *per record'*. 1 Com. Dig. 5. 8 Mod. 43.
(a) 1 Geo. 2. Stat. 2. c. 13. s. 11.

That he made default, and the Justices certified to the quarter-sessions, that he was duly summoned, and made default, and such default was recorded *prout patet per record' coram justitiis, &c. remanen', &c.* and that he did not afterwards take the oaths either at the same sessions, or elsewhere; *Et hoc parat' est verificare*. The plaintiff demurred to the plea, and for cause of demurrer shewed, that the defendant did not shew the record of the conviction *sub pede figilli*; and the defendant joined in demurrer.

And it was argued by Serjeant *Reynolds*, and afterwards by Serjeant *Darnell*, for the plaintiff, that the defendant ought to shew the record of the conviction *sub pede figilli*, and this ought to be by *Certiorari* and *Mittimus*; as if outlawry be pleaded in abatement (1), it must be pleaded *sub pede figilli*; and so excommunication. *Co. Litt.* (a)

(a) *Co. Litt.*
128. b.
1 Salk. 217.

And so it was resolved in the case of (b) *Woodcrest* versus *Lord Petre*, where recusancy was pleaded; and resolved, that it ought to be pleaded *sub pede figilli*.

(b) 2 Lutw. 1100.
3 Lev. 332.

To which Serjeant *Chefbyre*, and afterwards Serjeant *Pengelly*, replied, that a plea of recusancy need not to be *sub pede figilli*; for the record itself is pleaded, and reference is made to the record; and the plaintiff may reply *Nul tiel record*,

(1) It is not necessary to produce it *sub pede figilli*, when outlawry is pleaded in bar. 2 Lutw. 1514. or if the outlawry is in the same Court. *Co. Litt.* 128. b. 1 Lutw. 40. 2 Lutw. 1514. 2 Mod. 267.

MOORE v.

[308]

and the Court may write to the Justices for the record. When outlawry is pleaded in abatement, the writ of exigent, upon which the outlawry is returned, may be shewn *sub pede figilli*, (*viz.*) the writ itself under seal may be produced. So excommunication must be certified under the seal of the ordinary, and may be shewn under the seal of the ordinary testifying it; but the record itself cannot be certified under the seal of the Court where the record remains.

Another reason why outlawry and excommunication ought to be *sub pede figilli*, is, to assure the plaintiff of the verity of the plea; but if the plaintiff accepts the plea, it is then too late to make this objection: if it was not so, it was a reason for refusing the plea, and the plaintiff might sign his judgment; but if he receive the plea, he cannot demur for this defect; and so it was said by Holt C. J. and afterwards in the case between (a) *Craemer* and ——— *Mich. 11 Anne*, as Serjeant *Pengelly* said it appeared by his note of the same case, which is reported in 1 *Salk.* but this matter does not appear there.

(a) 1 *Salk.* 264.

And as to the objection, that when this is shewn for cause of demurrer, it amounts to a refusal of the plea; for how could he refuse it, if he did not submit it to the Court, whether this be not a bad plea for this cause; Serjeant *Pengelly* replied, that a plea in abatement is not aided by the stat. 4 & 5 *Anne*, c. 16. which was intended to aid those pleas only which go to the right of the action; and therefore the shewing of this matter for cause of demurrer does not avail any thing; for if it was necessary to make the plea good, it would be sufficient to object it, without shewing it for cause of demurrer; and if it was not such a reason as would render the plea bad, if it had not been shewn for cause of demurrer, the shewing it for cause of demurrer will not give it any advantage; as where by the stat. 4 & 5 *Anne*, no dilatory plea shall be received unless an Affidavit be made of the truth, or some probable cause be shewn of it to the Court; if the plea be received, it cannot be shewn for cause of demurrer, that there was no Affidavit made of the truth of it.

But

But the Court did not give any opinion, whether it was necessary to plead it *sub pede sigilli*. The Chief justice said, it was pleaded without saying *sub pede sigilli*; but in *Woodruffe's* case it was said that it ought to be so; and *Tracy* said the precedents were so. *Clift's Ent.* 3.

MOORE v.

[309]

And if it was a bad plea for this defect, why should not advantage be taken of it, when it is specially assigned for cause? But the Chief Justice said, they would not give any opinion as to that point. But the Court gave judgment that he should answer over upon another point, (*viz.*) The plea says, that the plaintiff was duly summoned, and made default, which default was recorded *prout per record' ibidem residen' pat'*; and then alleges as matter *in pais*, that he did not take the oaths at the Quarter-Sessions, or afterwards, *& hoc parat' est verificare*, without saying *verificare per Record'*, whereas there is no conviction till the refusal of the oaths at the sessions; for if he had not appeared before the justices who summoned him, but had afterwards appeared and taken the oaths at the sessions, he could not have been convicted, and therefore it ought to have been said, that he was convicted *prout patet per record'*, *&c.* *& hoc parat' est verificare per record'*; and if the statute 4 & 5 Anne does not extend to pleas in abatement, then this omission is not aided.

Hall *verj.* Downes. In C. B.

Case 159.

A Prohibition was granted (*nisi*) to the spiritual Court, where there was a libel by *Downes*, Vicar of *Painswick* in the diocese of *Gloucester*, for these words, *Thou art, or he is false, forsworn or perjured*. And it was now insisted, that by the libel it appears, that the said *Downes* *fuit infra Sacros Ordines*, and Vicar of the church of *Painswick* in the diocese of the Bishop of *Gloucester*, *quelque ad infamiam, lesion', derogation' & diminution' status, nominis, bone fame, sacraque sue function' sonantia verba diffamatoria sequen' dixit*, (*viz.*) *Thou art, or he is* (*presat' Johannem Downes innuendo, seu de eodem loquendo*) *false, forsworn or perjured*; and when a libel is for words spoken of a clergyman with regard to his function, though in other cases for

Prohibition shall be granted to the spiritual Court where a libel is for words spoken of a clergyman, which are actionable at common law.
Supra. p. 25.
2 Str. 946.
2 Kel. 101. 103.
Comb. 263.

HALL v.
DOWNES.

for the same words a prohibition may be granted, as for words of passion, or for words actionable by the common law, yet in the case of a clergyman no prohibition shall be granted.

I agree, that if there be a libel in the spiritual Court for punishing any one for perjury, or for words which charge a layman with perjury, or perhaps a clergyman with perjury, which appears to be committed in a temporal Court, a prohibition will be granted. (1)

But here the charge is general, and therefore if the spiritual Court can take cognizance of the offence with which these words charge him, it shall take cognizance also for the defamation with which he is charged.

That the spiritual Court has cognizance of perjury appears from *Lind. 96. v. Hujusmodi*, 315. v. *Perjurio*, especially if it be perjury by a spiritual person; and therefore perjury is a cause of deprivation. *Lind. 114. v. Canonice dispensatum*; and if a libel be for discovery whether he be perjured, in order for deprivation, no prohibition lies. (a) 1 *Sid. 217*. And it is agreed by Chief Justice *Holt*, that the spiritual Court has jurisdiction over their own members, and in perjury in the ecclesiastical Court in spiritual matters. 1 *Salk. 134. (b)*

(a) 1 *Lev. 138.*
1 *Keb. 721...C.*

(b) 1 *Raym.*
451. S. C.

If then the spiritual court has cognizance of this offence, it shall also have cognizance of the words which charge him with this offence; and though the words are, *is false, forsworn, or perjured*, the words being in the disjunctive must be intended to be synonymous to *false and forsworn*, and such perjury as the spiritual Court has cognizance of; for *Lind. says, Perjurium fit tribus modis, jurando contra conscientiam, jurando illicit, veniendo contra juramentum*. *Lind. 56. v. Perjurio*; and therefore this libel being in the disjunctive, shall be construed only of such a falsity as is called perjury by the ecclesiastical law, and not such as is made perjury by the common law.

(1) Lord Coke says "If a man call one a perjured man he must take his remedy at the common law. 2 *Inst.* 493.

And if it were such, the suggestion is not sufficient; for it ought to be suggested, that the words were spoken in reference to an oath taken in a temporal Court, &c. and that he had pleaded that matter there, and the plea refused, and of which an Affidavit ought to have been made; as in 1 Vent. 10. a prohibition was refused to a suit in the spiritual Court for these words, *you are an old thief and old whore*; upon a suggestion that if the words were spoken, they were all at the same time, for that ought to have been pleaded to the jurisdiction there. *Lutw.* 1043. 1054.

HALL v.
DOWNES.

Sed non allocatur. For a prohibition lies where the suit is for words actionable at common law; and to say he is perjured is actionable, and if there be a suit for such words in the spiritual Court a prohibition lies. 2 Inst. 493. 2 Rol. 29. *Golds.* 113. And when the words appear to be actionable, there is no occasion to plead that in the spiritual Court; and therefore the rule for the prohibition was made absolute, unless the defendant *crassino die* would accept a declaration in prohibition, upon which this matter might be farther considered. (2)

2 Burr's E. L.
124.

(2) Dr. Gibson says, "To secure causes of defamation in the spiritual Court, against prohibitions, they must have these two incidents. First, That they concern matters merely spiritual. Secondly, That they concern mere spiritual matter only, and not mixed with

any matter determinable at the common law. But if a minister is defamed in any article relating to the discharge of his *ministerial function*, this is agreed by the books of common law, to be duly triable in the spiritual Court. 2 Gib. Cod, 1025.

More *vers.* Manning. In C. B.

Case 160.

THIS was an action of *Assumpsit* upon a promissory note given by Manning to Statham and order; Statham assigns it to Witherhead, and Witherhead to the plaintiff; and upon a demurrer to the declaration an exception was taken, because the assignment was made to Witherhead, without saying to him *and order*, and then he cannot assign it over, for by this means

An original bill payable to one and his order, is assignable afterwards to whomsoever it is indorsed, though the words *or his order* be omitted. 1 Selk. 133. Vin. Abr. Tit.

Bills of Exchange. (H.) pl. 14. 2 Burr. 1216. 1 Blackst. Rep. 295. 5 C. 1 Str. 557. Dougl. p. 640.

Statham

MOSE v.
MANNING.

Statbam who had assigned it to *Witherhead*, without subjecting himself to his order, will be made liable to be sued by any subsequent indorsee. And to this the Chief Justice at first inclined, but afterwards it was resolved by the whole court, that it was good.

[312]

2 Burr. 1227.
2 Str. 1103.
Vin. Ab. Tit.
Blanks (A) pl. 7.

For if the original bill was assignable (as it will be if it be payable to one and his order) then he, to whomsoever it is assigned, has all the interest in the bill, and may assign it as he pleases, for the assignment to *Witherhead* is an absolute assignment to him, which comprehends his assigns, and therefore nothing is done when the bill is assigned but indorsing the name of the indorser, upon which the indorsee may write what he will, and at a trial when a bill is given in evidence, the party may fill up the blank as he pleases. (1)

(1) "The mere omission of words to make an indorsement restrictive." Bayley on Bills. p. 14.

Cafe 161.

The King *vers.* Pond. In B. R.

A *Noli prosequi* may be granted upon an indictment against a surgeon for refusing to be a constable.
3 Barn's Juss.
398.

THIS was an indictment against *Pond* a Surgeon, for refusing to be constable; and it was moved to *Raymond* Attorney General, that a *Noli prosequi* might be granted; for by the statute 5 H. 8. c. 6. (1) upon the petition of the warden and company of surgeons, it was enacted, that the suplicants be not chargeable of constableness, watch-office, bearing arms and inquests in the city of *London*, and by the stat. 32 H. 8. c. 42. all persons of that corporation were exempt from bearing arms or putting on to watch or inquest, and therefore by their charter 2 Jac. 1. they are exempt.

(1) By the St. 18 Geo. 2. c. 15. s. 10. Surgeons in *London* are exempted from the office of constable.

And

And though it was holden that (2) physicians are not exempt, (a) 1 *Sid.* 431. 1 *Mod.* 22. 2 *Keb.* 578. Yet it is said by *Kettle*, that surgeons may be exempt, and by the equity of those statutes and custom of the realm, all surgeons have been allowed the same privilege, and therefore a *Noli prosequi* was allowed, unless cause; and no cause was shewn as ever I heard.

The King v.

Pons.

(a) The authority of this case is denied in *Comb.* 31.

(2) By the St. 32 Hen. 8. c. 40. the faculty of physick in London, shall not be chosen constables.

Gilbert, Earl of Coventry, *vers.* Anne Countess Dowager of Coventry. Intr. Hil. 3 Geo. Rot.—In B. R. Case 162.

THIS was an issue directed out of the court of chancery to try the validity of five leases made by *Thomas Earl of Coventry*, husband of the defendant.

Where tenant for life of the reversion of lands which were in lease for lives, by virtue of the

following power under a settlement, "That it should be lawful for every person, who should be actually seized of the freehold of the premises limited in use, to make leases of any part thereof which had been usually letten for lives or years, of which he should be so actually seized by virtue of the limitations aforesaid, by indenture for any term not exceeding twenty-one years, or determinable on one, two, or three lives, &c. — So as there were not in any part of the premises so leased at any one time any more or greater estate or estates than for twenty-one years, or for three lives, or for any number of years determinable upon three lives," made several leases for ninety-nine years, to commence from the death of a remaining life in a former lease; the Court determined them to be in pursuance to the power under the settlement. *Powell on Pow.* p. 418. *supra.* p. 37.

The first lease was by indenture dated the 30th of May, 1701, to *S. Shephard* and *H. Crow* for 99 years from the death of *Sir Thomas Haslewood*, Bart. if the defendant should so long live, rendering 3 *l.* 8 *d.* *per annum* after the death of the said *Sir Thomas Haslewood*.

[313]

The second was by an indenture dated the 14th of July 1710, to them for 99 years from the death of *Nest. Bishop*, if the defendant and *Richard Leggs* should so long live, rendering 4 *l.* 14 *s.* 2 *d.* *per annum*, after the death of the said *Nest. Bishop*, and a heriot or 4 *l.* upon every death.

The third was by an indenture dated the 15th of July 1710, to them for the same term, from the death of *Armell Green*, at the rent of 18 *s.* 8 *d.* and a heriot or 4 *l.* &c.

The

COVENTRY v.
COVENTRY.

The fourth was by an indenture dated the 17th of July 1710. for the same term.

The fifth was by an indenture dated the 22d of July 1710, for the same term.

Upon the trial before J. *Blencow* at the assises at *Worcester* a special verdict was found.

That *Thomas Lord Coventry* made a lease of the lands in the second lease to *William Bishop* for 99 years, if he, *Robert Bishop* his son, and *Nest. Bishop* his daughter should so long live, rendering 4 l. 14 s. 2 d. per annum, and a heriot or 4 l. for every death, and doing fruit, &c.

That he or his ancestors leased the lands in the other leases for 99 years, if three lives so long lived.

[314]

That *Thomas Lord Coventry* being seised of the reversion expectant upon these several leases, upon the marriage of *Thomas* his eldest son with the defendant, by indenture dated the 20th of Jan. 1690 conveyed the said lands to the use of himself for life; remainder to *Thomas* his eldest son for life; remainder to his first and other sons in tail male; remainder to *Gilbert* his second son, the now plaintiff for life, &c. with a power to make leases in these words, provided it shall be lawful for every person, who shall be actually seised of the freehold of the premises herein before limited to him in use, to make leases of any part thereof which hath been usually letten by lease for lives or years, of which he shall be so actually seised by virtue of the limitations aforesaid, by indenture for any term not exceeding 21 years, or determinable on one, two or three lives, so as on every such lease be reserved and made payable, during the continuance of such lease, the accustomed rent, or more, or as much as can be reasonably got for the same, so as no such lease be made dispunishable of waste, and so as there be not any part of the premises so leased at any one time any more or greater estate or estates, than for 21 years, or for three lives, or for any number of years, determinable on three lives.

That *Pasch. 3 W. & M.* a fine was levied of the lands to the same uses.

That

COVENTRY v.
COVENTRY.

That the Lord *Coventry* died, and *Thomas* the husband of the defendant entered, and was seised for his life, and made the first lease on the 30th of *May* 1701. That the rent reserved was the antient and accustomed rent. That all the lives, except the life of Sir *Thomas Haslewood*, were determined at the time of making this lease; that Sir *Thomas Haslewood*, attorned tenant pursuant to this lease; that he afterwards made the several other leases, upon which the antient rents were reserved, and that no prior estate continued *in esse* in any of them except a term, for 99 years determinable upon a single life.

And the single question upon this special verdict was, whether these leases were pursuant to the power?

And I argued that these leases were pursuant to the power, that they were made by the husband of the defendant who was then seised of the freehold by virtue of the limitations in the settlement; that they were made of lands usually leased for lives or years; that they were made by indenture for a term of years determinable upon one or two lives, rendering the accustomed rents, not dispunishable of waste, and that there are not upon any of the lands demised more or greater estates, than estates for years determinable upon three lives.

The principal objection is, that the leases made by the Earl of *Coventry* are leases in reversion.

[315]

And I argued, that where a power is annexed to the estate of one in possession to make leases, without saying in reversion, he can make a lease in possession only, and not a lease in reversion to commence *in futuro*. 6 Co. 33. a. *Mo.* 199. 2 Cro. 318. *Yelv.* 222. (a)

Pow. on Powers, p. 411.
Supra. p. 39.(a) 1 Brownl.
148.

So if the power be to make leases for one, two or three lives he cannot make a lease for a life not *in esse*. *Ray.* 163. 247.

Powell on Pow.
P. 391.

But if the power be annexed to a settlement of lands, part in possession, and part in reversion, to make leases in possession or reversion, he may make a lease in reversion of lands not in possession. 8 Co. 69. b. *Whitlock's case*, *Winter* and *Loveday*, 2 *Salk.* 537.

Pow. on Powers.
425.

Supra. p. 39.

So

COVENTRY v.
COVENTRY.

(a) 1 Keb. 778.
910. Raym. 132.
S. C. Pow. on
Pow. p. 420.

So if the power to make leases, annexed to a settlement of estates demised for life or years, be expressly confined to make leases in possession, a lease in reversion or *in futuro* is not warranted by such power. 1 Sid. 101. 260. (a) 1 Lev. 168, S. C.

(b) 4 Leon. 17.
S. C.

So where a man has power to make a lease pursuant to a power, he shall not make a second lease to commence pursuant to his power. 1 Leon. 36. 3 Leon. 71. (b) 2 Salk. 537.

Pow. on Powers.
415.

But where a man makes a settlement of the reversion of lands demised for lives or years, to the use of B. for life, with power to make leases generally, he may make a lease during the continuance of a former lease, to commence after the former, otherwise his power would be ineffectual; and this was agreed in the Marquis of Northampton's case, 1 Leon. 36. 3 Leon. 71. Dy. 357. a. 2 Roll. 261. pl. 8. 1 Lev. 168. 1 Sid. 260.

[316]

The intent of this power seems to be, that the party having such power should fill up the lives as they drop; and if he had done this upon a surrender of the former lease, without doubt it would have been good; and if this is done by another lease of the reversion, it seems to be the same thing in effect, for the estate of him in remainder is not prejudiced more in the one case than in the other; for if a lease, upon the surrender of a former lease, was to be made determinable upon three lives, it would be of equal duration, and equally disadvantageous to him in remainder or reversion, as if there were two leases which both determined upon the same lives.

And it would be unreasonable, that the prior lessee should have the power to defeat the execution of a power by his surrendering up his lease or not.

And it seems to be agreeable to the intent of the power in this case, that he who had the freehold by virtue of the limitations in the settlement should be enabled to make leases; for it is the sole qualification required in him for exercising the Power; and all the other requisites, as to the manner of exercising his power, are found by the verdict to be observed.

There

There can be no doubt but upon this requisite, so as there be not at any one time any more or greater estates than for twenty-one years or for three lives, or for years determinable on three lives; and these words shew that it was not the intent of the power to confine the party that he should make but one lease; for it appears by the words in the plural number that several estates were allowed at the same time, but all were to be determinable on three lives.

COVENTRY v.
COVENTRY.

As to the objection, that in some of the leases the same heriots are not reserved as were before;

I answer, that the power requires only that the ancient and accustomed rent be reserved; and if this be reserved, the reservation of heriots or other casual profits, is not necessary. *Co. Litt.* 44. b. 6 *Co.* 37, 38. 2 *Cro.* 76. *Mo.* 759.

[317]

Pow. on Pow-
ers 572.

If it be objected, that this lease is not a lease of the reversion, but a lease to commence at a future day, for each lease is for ninety-nine years to commence from the death of the remaining life in the former lease; that will make no difference, for the one lease as well as the other is to take effect at the same time when the other determines; and tho' it be to commence after the death of the remaining life, and the prior lease may determine before by forfeiture or surrender, yet forfeiture or surrender shall not be presumed.

A lease to commence from the death of a prior lessee for life will be good.

And after many arguments the Court was of opinion, that these leases made by *Thomas Earl of Coventry* were good, pursuant to the power given him by the settlement. (1)

(1) In the case of *Baynes v. Belfon*, *M.* who were tenants for lives at the time of making the settlement, and the court determined the power to be ill executed, the lease being to commence after the death of *J.* and *commence in futuro.*

D E

Term. Sanct. Mich.

6 Geo. I. In C. B.

Case 163.

Ellerton & ux' *vers.* Gastrell.

A Marriage with the wife's sister's daughter was holden to be within the *Levitical* Degrees; so a prohibition was denied to the Spiritual Court, where a libel for that purpose was exhibited. 1 Sid. 434. 1 Mod. 25. 2 Keb. 551. S. C. 1 Gibb. Cod. p. 412. 2 Burn's Eccl. Law. 415.

A Prohibition was granted *nisi causa, &c.* to the Court of the Archdeacon of *Richmond* in the diocese of *Chester*, where a libel was exhibited for the marriage of *Ellerton* with his now wife, being the daughter of the sister of his former wife, upon a suggestion that it was not within the *Levitical* Degrees.

And for cause I insisted, that the marriage was within the *Levitical* Degrees.

Vide St. 25 H. 8. c. 22. f. 4. & St. 32 H. 8. c. 38.

The statute 28 *Hen. 8. c. 7.* enacts, that no person shall marry within the degrees before rehearsed; and if any be married within the said degrees, the persons so unlawfully married shall be separated by the sentence of the Archbishops, Bishops, or other Ministers, &c. within the limits of their jurisdictions and authorities.

The marriages prohibited, and which are to be dissolved by the sentence of the Spiritual Court, are all within the degrees there mentioned, tho' they are not expressly mentioned in the statute; and therefore when the statute mentions as unlawful the marriage of the son with the aunt, being his father's or mother's sister, or with his uncle's wife who is his aunt by affinity, the marriage of the niece with her uncle by consanguinity.

nity or by affinity (which is the present case) is within the same degree, and consequently disallowed by this statute. ELLERTON v. GASTRELL.

So in *Leviticus ch. xviii. verse 12, &c.* the *Jews* are forbidden to uncover the nakedness of the father's or mother's brother or sister, (*viz.*) the uncle or aunt by father or mother; and an uncle or aunt by affinity, though not named, are within the same degree with the persons there mentioned.

So in the table of kindred and affinity, who by Scripture and our laws cannot intermarry, which was published by authority in the year 1563. and which by the 99th canon made in the year 1603. is allowed,

A man cannot marry his wife's sister's daughter; and the Canons of 1603. were established in the Convocation, which had a licence under the Great Seal to agree to such canons as they approved, and which were afterwards ratified by the King under the Great Seal, and therefore are allowed as the Ecclesiastical Law of this realm. And by Canon 99. all marriages prohibited by God's Law, and expressed in this Table, are declared incestuous and unlawful, and no person shall marry within the degrees prohibited and expressed in the said Table, &c. 2 Vent. 20.

In the case of *Mann*, who had married the daughter of the sister of his former wife, it was holden by the High Commission to be unlawful; and though a prohibition was granted, *Mo. 907. Cro. Eliz. 228.* yet a consultation was afterwards awarded; for a prohibition ought not to be granted, if it is within the *Levitical* degrees. *Cro. Eliz. 228. Vaugh. 247. 321. 4 Leon 16.*

So in *Pearson's case*, upon such a marriage a prohibition went; but a consultation was afterwards granted. *Vaugh. 248. 322.* And this perhaps is the reason why that case, which was mentioned as having a prohibition granted by the Court of Common Pleas, in the first edition of *Co. Lit. 235. a.* without mentioning the consultation, was totally omitted in the subsequent Editions.

Gibb. Cod. 413.
2 Burn's E. L.
413.
Harg. Co. Litt.
235. a. N. 1

ELLERTON v.
GASTBELL.

(a) Cro. Jac. 573.

2 Roll. Rep. 178.

Palm. 111.

Jenk. 318. S. C.

(b) Nov 29.

Hutt. 18. S. C.

Hobart 181. (a) in the case of *Howard* versus *Bartlett*, speaks of *Rennington's* (b) case, who had married the daughter of the sister of his former wife, for which he did penance by order of the High Commission, 16 Jac. and after his death she claimed her free-bench; and it was allowed, because there was no divorce *a Vinculo Matrimonii*, tho' *Hobart* says there was cause. So 2 *Inst.* 683. Lord *Coke* says, that though the marriage of the nephew with his aunt be prohibited, *Lev.* 18. (c) and the marriage of the uncle with his niece be not there prohibited by exprefs words, yet such a marriage is prohibited, *qui eandem habet rationem propinquitatis cum eis qui nominatim prohibentur, & sic de similibus*. So by *Vaughan* it is expressly agreed, that the marriage of the uncle with his niece, or with the niece of his wife, is within the *Levitical* Degrees. *Vangb.* 323.

(c) *Levit. ch. 18.*
versé 14.

So in the case of *Wortley & ux* ver. *Watkinson*, 33 *Car.* 2. in *B. R.* on a prohibition it was strongly argued by *Wallop*, that such a marriage was lawful; yet a consultation was granted. (d) 2 *Lev.* 254. 2 *Jones* 118.

(d) & *Show.* 70.
3 *Keb.* 660.
S. C.

And afterwards in the like case between *Watkinson* ver. *Margatren* in *B. R.* *Paf.* 34 *Car.* 2. a prohibition was denied. *Ray.* 464. (e)

(e) 2 *Jon.* 191.
Skin. 37. S. C.

In *Trin.* 5 *W. & M.* in the case between *Hanour* and *Bradshawe*, a prohibition was granted, in order that the plaintiff might declare on such a case; but *Levinz* says, that he heard no more of it. 3 *Lev.* 364.

But in the case of *Snowling* and his wife ver. *Newey*, after two or three arguments, it was resolved by *Trevor* and all the Court, 1 *Anna*, that a consultation should be granted. *Lut.* 1077.

The same matter was moved in *B. R.* in the case between *Clement* and *Beard*, and *Holt* said there, that he took that question to be settled, for if it was the daughter of his own sister, there could be no question; and if it was the daughter of the wife's sister it is the same relation by affinity, and therefore within

within the *Levitical* Degrees. 5 *Mod.* 448. Upon which ELLERTON v. GASTRELL.
the rule in this case was discharged.

Huddy & ux', Administrators of William Gifford, *vers.* J. Yate Gifford. In C. B. Case 164.

THIS was an action of debt upon a bond given by the defendant to the intestate dated the 29th of *April* 1707. Upon a writ of error brought after judgment, in an action upon a bond with condition for the payment of money only, execution ought not to be stayed, if bail be not found. Vin. Abr. Tit. *Superfideas* (C.) pl. 13. 1 Rich. Pr. K. B. p. 535. 2 Crompt. Pr. 345.

Upon oyer of the bond it appeared, that the condition recites, that *William Gifford* was bound with the defendant for a debt of the defendant's by bond of the same date, to pay 5*l.* 10*s.* to *Lat. Ridley*, on the 30th of *October* then next; if therefore the defendant pay to the said *Latimer Ridley* the said 5*l.* 10*s.* on the said 30th of *October* in discharge of the said recited obligation, then, &c. The defendant pleaded *Quod solvit præd' 5l. 10s. præd' Lat. Ridley super 30 Oct. in exoneration' recitat' oblig.* The plaintiff replied *Quod non solvit*; to which there was a demurrer, and judgment for the plaintiff.

After judgment the defendant brought a writ of error, and did not find bail; upon which the plaintiff sued out execution, for that by the statute (a) 3 *Jac. c.* 8. it was enacted, that no execution shall be delayed by writ of error, or *Superfideas* thereon, for reversing any judgment in any action or bill of debt upon any single bond for debt, or upon any obligation with condition for payment of any money only, or upon any action or bill of debt for rent, or upon any contract, in any Courts of *Westminster*, &c. unless the person, in whose name error is brought, with two sureties first become bound by recognizance, &c. to him or whom judgment is given, in double the sum recovered, to prosecute the writ of error with effect, &c.

(a) Made perpetual by the St. 3 Car. 1. c. 4. f. 4. and the St. 16 & 17 Car. 2. c. 8. f. 3.

And it was insisted by Serjeant *Whitaker*, that bail was not required here, for that this obligation was in the nature of

HUDDY v.
GIFFORD.

Yelv. 227.
2 Bulst. 53.

(a) Comb. 105.
S. C.

(b) 10 Mod. 281.

an obligation to indemnify, which would not be within the statute, which ought to be taken strictly; and therefore, if error be brought in an action of debt upon a bond for the performance of covenants (1), bail is not required; neither in debt upon a bond for the performance of an award, or for the payment of 300 l. upon the return of a ship (a) 1 *Shov.* 14.; and for the same reason it is not required in this case; for if the defendant had tendered the money to *Ridley* on the day of payment, in an action of debt brought by *Ridley* against him upon the bond, he might have pleaded this tender and refusal; but to this condition he could not plead it. *Co. Litt.* 207. a. And this point was determined in *B. R. Hil.* 1 *Geo.* in the case between (b) *Hammond* and *Webb*, when the condition recited a former bond given by the defendant to *A.* and then goes on, if the said *Webb* shall pay the said sum of 100 l. to the said *A.* on the said 25th of *April*, then, &c. in the same words as the present case. And the Court were of opinion, that bail was not necessary, for it was of the same nature with a bond to indemnify, though no judgment be entered up in that case, because the plaintiff affirmed his judgment on the writ of error.

But on the other side it was urged, that this bond is only for the payment of money, and so without doubt within the letter of the statute: but bonds for performance of covenants, awards, &c. or for payment of money upon the return of a ship on a (2) bottomree-contract, or to indemnify, are out of the letter of the act, and therefore there is good reason that bail should not be required upon a writ of error in such actions.

But where the bond is within the words of the statute, this statute has been construed beneficially for the subject;

(1) Even if one of the covenants is for the payment of money, because the statute requires that it should be for the payment of money only. *Carth.* 28.

(2) It was determined in the case of *Pitt v. Conry*, 1 *Spr.* 476. where the plaintiff had recovered on a bottomree-bond

and the defendant had brought a writ of error without putting in bail, that the contingency having happened, it was in every respect a bond for the payment of money only, and therefore that bail was necessary.

and

and therefore where there was a condition for the payment of such a sum of money to *B.* as *A.* should declare to be due from the defendant to him, upon an account stated between the plaintiff and defendant, it was resolved, that bail was necessary in a writ of error, by three Judges against *Kelyng.* (a) 1 *Lev.* 117.

HUDDY v.
GIFFORD.

(a) 1 *Keb.* 613.
S. C.

So in an action against an executor or administrator, if judgment is generally against him *de bonis propriis*, and he brings a writ of error, he must find bail, (b) 2 *Cro.* 350. 1 *Sid.* 368. (c) And the case between *Hammond* and *Webb* was not determined, for no judgment was given, and therefore nothing appears but that the Court doubted upon this point.

[323]

(b) 2 *Bull.* 284.
S. C.
(c) 2 *Keb.* 371,
1 *Lev.* 245. S. C.
Cro. Car. 59.

The Ch. J. *King* seemed to think that this case was within the letter of 3 *Jac.* and he thought that this statute ought to have a liberal construction; but because the Judges of the King's Bench doubted, and inclined to the contrary opinion that there might be one uniform opinion in the two Courts, it was agreed to be put off till the Court could talk with the Judges of the King's Bench.

And in the last day but one of the term the Chief Justice delivered the opinion of the Court, and said,

That this Court was agreed that execution ought not to be stayed in this case, if bail was not found, for the statute ought to be construed liberally, and for the benefit of him who had obtained judgment, and that no judgment was given in the case of *Hammond* and *Webb*, and therefore the rule for staying execution was discharged.

Salmon *vers.* Denham & al'. In C. B.

Case 165.

THIS was an action of Ejectment, upon the demise of *Stephen Saunderfon*, and a second demise was alledged by *Thomas Saunderfon*.

A devise to a man desiring him to pay a sum in gross carries a fee.

SALMON W.
DENHAM.

Upon not guilty pleaded, the Jury at York assizes on the second demise found the defendant not guilty.

[324]

As to the first devise they found specially, that *John Little* being seised in fee had three sisters, *Elizabeth*, *Dorothy* and *Jane*; that *Jane* married *William Brown*, by whom she had issue *William*, *John*, *Hannah*, *Mary* and *Dorothy*; that *Hannah* married *Stephen Saunderson* the lessor of the plaintiff, by whom she had issue *Thomas Saunderson* the second lessor, now alive; that *John Little* being seised, by his will dated the 26th of *September 1674* devised other lands to *Thomas Chappell* his sister's son and the heirs of his body; remainder to *William Brown*, *John Brown*, *Thomas Mitchel* and *George Scarf* his sisters sons and their heirs, paying 5 *l.* yearly to *Elizabeth Scarf* during her life; other lands he devised to *William Brown* and the heirs of his body, and for want of such issue to *John Brown*, *Thomas Chappel*, *Thomas Mitchell* and *George Scarf* and their heirs.

Then he adds these words, *Item, I give my house and lands* (which were the lands in question) *to John Brown, the said William Brown paying to Elizabeth Scarf 3 l. yearly during her life, and the said John Brown paying to the said Elizabeth Scarf 2 l. yearly during her life.*

Other lands he devised to *George Scarf* and the heirs of his body; remainder to *William Brown*, *John Brown*, *Thomas Chappel*, *Thomas Mitchel* and their heirs.

Then he devises several legacies, and devises several lands to be sold for the payment of his debts and legacies, and afterwards adds this clause.

If the lands I have assigned to be sold, and my personal estate, will not hold out to pay my debts and legacies, what shall be unpaid shall be paid out of the proportion of the lands I have given to *William Brown*, *John Brown* and *George Scarf*.

SALMON v.
DENHAM.

The Jury found that *John Little* died, and his sisters *Elizabeth* and *Dorothy*, and *William Brown* the son and heir of *Jane* the other sister, were his heirs.

That *Elizabeth* died, having issue now alive, that *Dorothy* died without issue, that *William Brown* heir of *Jane* died without issue, and afterwards *John Brown* died without issue, and after his death *Stephen Saunderfon*, in right of *Hannah* his wife, entered on the lands devised to *John Brown*, and that afterwards *Hannah* died, *Dorothy* and *Mary* being now living.

[325]

That the lands in question devised to *John Brown* are 10 l. *per annum* and no more, and if upon the whole the Court be of opinion for the plaintiff, they find for the plaintiff, otherwise for the defendant.

And after argument by Serjeant *Pengelly* for the plaintiff, and Serjeant *Wynne* for the defendant, it was now argued by myself for the plaintiff, and by Serjeant *Chesbire* for the defendant.

And for the plaintiff it was insisted, that the lessor of the plaintiff had title *quacunq; via*; for if *John Brown* had only an estate for life, he was only intitled to a fifth part of the reversion; if he had an estate in fee, he was intitled to a third part.

And it was argued that the lessor of the plaintiff ought to have a third part, for that *John Brown* by this devise took an estate in fee; for if a man devises lands without limiting any estate, the devisee paying a sum in gross, this shall be by construction an estate in fee. This is settled, *Bro. Tit. Estates pl. 78. Tit. Testament pl. 18. Cro. Eliz. 204. 3 Co. (a) Wellock and Hammond, 6 Co. 16. a. Collier's case, (b) 2 Cro. 527. 591. 599, 600. 1 And. 38. 1 Rol. 834. pl. 5. and in many other cases.*

Cowp. 237. 239. 841. 3 Burr. 1621. 1625. (a) 3 Co. 20. b. 2 Leon. 114. S.C. (b) Cro. Eliz. 378. S. C. Harg. Co. Lit. 9. b. n. 2. Vin. Abr. Tit. Devise, (S. a.) 11 Mod. 102.

And though in this case the devise to *John Brown* is *ing 5 l. per annum to Elizabeth Searf* during her life, it makes

SWYMONY.
DENHAM.

no difference, for it is a sum in gross; and is to continue during the life of *Elizabeth Scarf*, and therefore it must be in fee, otherwise the estate devised might determine before the life of *Elizabeth*, to whom the 5 *l.* a year is payable.

Supra p. 64. 83.
Infra p. 374.

In the case of *Webb and Herring*, 2 *Cro.* 415. there was a devise to his son, and if his three daughters outlive his son and his heirs, they to have for life; and then I give the same to my sisters, they to pay 6 *l.* 10 *s.* yearly to the *Merchant-Taylors Company*, and if they deny payment the Company to enter.

[326]

(a) Godb. 280.
S. C.

It was adjudged that the sisters had a fee; so (a) 2 *Cro.* 527. 2 *Roll.* 80. S. C. *Spicer* versus *Spicer*, a devise to his wife for life, paying 3 *l.* per annum out of the profits to *Thomas* for his life, and if she died before *Thomas* to his son *Richard*, he likewise paying 3 *l.* a year to *Thomas* for his life, and 20 *s.* to his sisters. *Roll* reports it that it was 20 *s.* yearly to *L.* for life; and it was resolved that *Richard* had a fee, for the 20 *s.* is a sum collateral, and does not issue out of the land, and the value is not material; for if it was only a penny to be paid, it being a collateral sum which does not issue out of the profits, the devisee, shall have a fee; *Haughton* said for this reason, because the devisee, who is to pay to *L.* during his life, must have an estate to continue during the life of *L.* and therefore must have a greater estate than for his own life, for *L.* may survive him.

(b) 3 *Keb.* 692.
745. 1 *Fremm.*
438. S. C.

So in the case 27 *Car.* 2. *Read* vers. *Hatton*, (b) *Poll.* 399. 2 *Mod.* 25. a devise to *Robert* his son, upon condition that he pay 5 *l.* a year to his sisters, the first payment to be made at the first of the usual feasts which shall happen next after his death, so it be a month after his death, though the estate devised was 16 *l.* a year; yet it was adjudged that *Robert* had a fee. So (c) *Lee and Withers*, 2 *Jon.* 107. *Pollexf.* 545. a devise to *James* conditionally, that he allow his son *Nicholas* meat, drink, washing and lodging, during his life; tho' it was urged, that the word *allow* imported it to be out of the profits, yet it was resolved that it was a fee.

(c) 2 *Show.* 49.

And

And the difference is only where the payment is limited to be paid out of the profits, and where it is not limited; for this is the distinction taken 6 Co. 16. *a.* in *Collier's* case, a devise, paying a sum in gross, shall be a fee: paying therefore 20 s. yearly shall be only for life, which alludes to the case *Dy. 371. b.* where a devise to the wife after the death of his father, paying therefore to the right heirs of my father 40 s. yearly during her life, was adjudged only a devise for life. So it was determined in the case of *Annesley* vers. *Chapman, Cro. Car. 157.* 1 Jon. 211. S. C. that a devise to his sons, and they to bear part and part alike going out of the lands for life, was only an estate for life.

[327]

But if there was any doubt whether this clause gave *J. Brown* a fee, yet it would be removed by the clause which says, that if the estate to be sold and his personal estate will not hold out to pay his debts and legacies, what is unpaid shall be paid out of the proportion of the lands given to *William Brown, J. Brown* and *Geo. Scarf*, for a devise of lands to pay debts and legacies will carry a fee; so *Dy. 371. b.* a devise of lands to a man's sister, except my manor which I appoint to pay my debts, will be a devise of the manor in fee.

So a devise to perform a man's will, and to pay debts and legacies, was resolved by all the justices in *C. B.* to be a fee. *Bend. pl. 66.* And so it was decreed in Chancery. 1 *Ca. Chau. 196.*

And afterwards in the same term judgment was given for the plaintiff by the whole Court; for the Chief Justice said, that they were all clearly agreed in their opinions, that *J. Browne* had by this devise an estate in fee upon the whole of the will; though if it had been put upon the first words only, paying 5 l. per annum to *El. Scarf* for her life, they had not been all so clear in their opinions.

2 Vera. 106.

Cafe 166. William Vaisey *vers.* Hundred of Whiston in
Com. Gloucest. In C. B.

In an action upon the statute 13 Ed. 1. for a robbery, it ought to appear that the plaintiff has the whole property in the money of which the robbery was committed; or otherwise, if entire damages be given, it will be bad *in toto*.
3 Bac. Abr. 70.
2 Saund. 379.
2 Keb. 821.
S. C. Vin. Abr. Tit. Robbery (S.) pl. 15.
(a) 13 Edw. 1. Stat. 2. c. 6.

[*328]

THIS was an action upon the statute 13 Ed. 1. (a) in which the plaintiff declares *de placito quod quidam malefactor*, &c. in quosdam Johannem Goodman & Robertum Capell servient' ipsius quer' insult' fecer' & 67 l. consisten' de diversis peciis auri cusi vocat' guineas, & diversis peciis auri cusi vocat' half guineas de denar' ipsius Gul' Vaisry propriis in manibus & custod' prad' * Johannis invent' existen', ac viginti peciis auri cusi vocat' guineas, in manibus & custodia prad' Roberti invent' existen', de eisdem Johanne & Roberto felonice ceper', asportaver' & abduxer', &c. in Domini Regis nunc contempt' & grave damnum ipsius Gulielmi & contra form' stat', & unde idem Willielmus qui tam &c. quer' quare cum quidam malefactor', &c. ut prius.

Upon not guilty pleaded a verdict was found for the plaintiff, and damages were assessed at 88 l.

And now Serjeant Chesbire moved in arrest of judgment, for that the plaintiff had declared only for 67 l. *ut de denar' ipsius Willielmi propriis*, but it does not appear by the declaration that the 20 guineas were the money of the plaintiff; for though they were in the possession of his servant (which, when the master is present, is sufficient to shew that they are the master's money, for the possession of the servant is the possession of the master, (1) where the master is present,) yet it is not of consequence that they are the money of the master who was absent, and therefore intire damages being given, it will be bad *in toto*.

Carth. 147.
3 Bac. Abr. 70.
2 Raym. 904.
3 Com. Dig. 477.
3 Mod. 288.

(1) It was determined in the case of *Combes v. Bradley Hundred*, reported in 4 Mod. 303. Comb. 263. Holt. 37. 12 Mod. 54. that if a man delivers money to a servant to carry, and he is robbed of it, the servant may maintain an

action against the hundred, and declare that he was possessed *ut de bonis suis propriis*; yet the master is not divested of his property, for he may bring an action, if he pleases. *Infra* p. 627.

Afterwards

Afterwards the Chief Justice said, that all the Justices were agreed that the plaintiff must have the property in the money of which the robbery was committed; and he and Tracy thought that it did not appear here that he had the property in the 20 guineas. But *Blencoe* and *Dormer* being of the contrary opinion, judgment was not arrested.

VAISEY &
WHISTON
HUNDRED.

Thomlinson *vers.* Arriskin. In C. B.

Case 167.

THIS was an action of trespass for taking away and detaining the wife for four months against the consent of the plaintiff her husband, *per quod consortium amisit, &c.* The defendant after imparlance *quoad vi & armis* pleaded not guilty, *quoad resid' transgr' dicit action' non' &c. quia dicit quod transgr' præd' unde præd' quer' superius se modo quer' fact' fuit tam per ipsum def' quam per quendam Hug' Martin, quodque post transgr' præd' & ult' contin' (viz.)* 27 May 5 Geo. the plaintiff the defendant and *H. Martin* submitted to the arbitration of *R. Wallas, H. Wallas* and *H. Richardson*, *ad arbitrand' de transgr' præd' inter quer' & eisdem def' & H. Martin & de diversis fact' inde inter eos tunc penden', & illi primo Jun' 5 Geo. arbitraver' quod defen' & H. Martin solverent quer' aut offerrent to his use 7 l. super tertium diem. Jun' ac duas integ' tertias part' omnium custag' ipsius quer' in & circa fact' præd' solubil' tam attorn' quam ballivo suis postquam billa inde produet' foret, &c. quas 7 l. they tendered on the 3d of June, and the plaintiff refused, quodque nulla billa custag' bucusque produet' fuit, &c.* To which the plaintiff demurred, and shewed for cause, that the plea was pleaded in bar of the action, whereas it should have been in *barram ulterior' manutention' action' ill'*, and the defendant joined in demurrer. And it was insisted for the plaintiff, first, that this award is not a bar, for that the submission was only *de transgr' inter quer' & defen' & quendam Hug' Martin & de diversis fact' inter eos tunc penden'*, which could not extend to a suit against the defendant only; and though it is averred, *quod transgr' unde quer' se querit' fact' fuit tam per Hug' Martin quam per defen'*, that is impossible, for though *H. Martin* might have been aiding to the defendant,

An award held good, notwithstanding some objections in point of form. Vin. Abr. Tit. Arbitrament, (Q.) pl. 18. (D. a.) pl. 32.

[329]

TROMLINSON
v. ABBOTKIN.

(a) *Infra* p. 621.

and in trespass (a) all are principals, and may be charged either jointly or severally, yet the declaration charges the defendant for a particular fact of his own, (*viz.*) that he took the plaintiff's wife & *per quatuor menses detinuit & adhuc detinet*, and the detainer by the defendant could not be committed by *H. Martin*; therefore the suit against the defendant for that fact could not be a suit *inter eos dependens*.

Infra p. 547.

Sed non allocatur; for the submission shall be construed to be of all actions between them, or any of them.

(a) 2 Keb. 332.
S. C.

An award to pay costs to be taxed by the Prothonotary, held good.
6 Mod. 195.
1 Salk. 75. S. C.
An award to pay costs of suit in an inferior court is void.

Secondly, It was insisted, that the award being, that the defendant should pay two thirds of all the plaintiff's costs to his attorney or bailiff in & *circa scilicet predictis*, is altogether uncertain; for though an award to pay costs, to be taxed by the prothonotary, has been allowed, (1) 1 Sid. 358. (a) yet here no person is named who is to tax the costs; and therefore an award to pay costs of suit in an inferior court is void. 1 Salk. 75. And here it is to pay costs to the bailiff; and therefore is like the case in 3 Lev. 413. to pay all reasonable expences in such a suit, which was holden to be void.

An award to pay costs in such a suit, is sufficient. Cro. Car. 383.

Sed non allocatur; for an award to pay costs in such a suit is sufficient, without saying any thing more, for they may be ascertained. (2) *Vide* 2 Vent. 242. 3 Lev. 18.

1 Roll. Abr. 253.
1 Com. Dig. 387.

Thirdly, The award is on one side only; for it directs, that 7 l. and costs shall be paid by the defendant, and directs nothing as to the plaintiff, nor does it say that all suits, &c. shall cease, or that this shall be in satisfaction of the plaintiff's demands, or any thing to that effect; and though an award, which expresses that it was made *de & super premissis*, may be construed to be made in satisfaction of all differences or de-

(1) "*Id certum est, quod certum reddi potest.*"

(2) The proper officer of the court may tax them. Barnes 56. In the case of *Dudley v. Nestlefold*, reported in 2 Str. 737. no one was appointed to

tax the costs of a reference, and the Court supplied the omission by ordering the matter to do it.

mands,

mands, yer this, being only averred by the plea, shall not be construed in such a manner.

THOMLINSON
v. ARKISIN.

Sed non allocatur ; for here the award is a parol award, in which the very words need not be expressed, but the effect and substance of it ; and therefore when it is said *Quod arbitratus de & super præmissis arbitraver' & determinaver'*, it is tantamount to saying, that the arbitrators for the conclusion of all differences between the parties accorded, &c.

In a parol award the very words need not be expressed, the effect and substance of them are sufficient. Carth. 157.

And therefore judgment was given for the defendant.

Wall *vers.* Fulwood & al.' In C. B.

Case 168.

THIS was an action of trespass, *quod* 19 Sept. 3 Geo. The defendants *vi & armis un' spadon' quer' absque causâ rationabili ceper', percusser', fugaver' & imparcaver', & spadon' sic imparcat' per spatium trium dierum detinuer', necnon* 20 Sept. 3 Geo. *un' al' spadon' quer' ceper' & abduxer'.*

An argumentative plea is not good.
5 Com. Dig. 70.

The defendants *quoad vi & armis, necnon tot' transgr' in nar' præd' mentionat' præter caption', percussio', fugation' & imparcation' un' spadon' super 19 diem Sept. & spadon' sic imparcat' per spatium trium dierum detention', non cul' ; & quoad un' spadon' ipsius quer' caption', percussio', fugation' & imparcation' & spadon' ill' sic imparcat' per præd' spatium trium dierum in nar' præd' mentionat' per eosdem defen' fieri supposit' dicunt quod ante præd' tempus quo, &c. Ricardus Fulwood was seized in fee of Chester Close, and that for damage-feasant there the defendants *spadon' præd' ceper', &c.**

[331]

The plaintiff replies, that he is rector of *Renslinch* in the county of *Worcester*, of which rectory a messuage and fifty acres of land are parcel ; that in the parish of *Renslinch* *quidam campus existit consisten' in part' de terr' arabil' in part' de prato vocat' Westfield de quo Chester Close in quo, &c.* is parcel ; that the rectors of the said rectory have time out of mind had right of common in that part of *Westfield* called the Arable Part, of which *Chester Close in quo, &c.* is parcel, *pro omnibus*

avertiis

WALKER.
FULWOOD.

averiis cor' nabil' in & super mess' & quinquaginta acr' præd' levan' & cuban' in quolibet anno quo campus præd' cum grano in debito tempore secundum consuetud' agricultur' ibidem seminat' fuit a tempore quo tot' gran' sic seminat' asportat' fuit' quousque aliqua pars campi præd' cum grano refeminat' fuit', & in anno quo jacet friscus & ad Worcet' per tot' ann' ill', quod anno tertio Geo. præd' Westfield in part' vocat' pars arabilis inde cum grano seminat' fuit & ante præd' tempus quo, &c. nullum gran' in eodem campo remanen' fuit per quod quer' posuit spadon' præd' super mess' & quinquaginta acr' terr' præd' levan' & cuban' in Chester Close ad co'ia sua ibidem utenda, &c.

The defendant rejoined, *quod sex acr' terr' vocat' Pratts Nathan prope Radford Bridge sunt parcel' de Westfield, & anno secundo Geo. cum grano seminat' fuer' & tempore quo, &c. duo careelat' vicari' eodem anno secundo seminat' fuer' remanen' in præd' sex acr' terr', & duob' careelat' ill' sic remanen' quer' de injuriâ propriâ posuit præd' spadon' in Chester Close præd'.*

To which the plaintiff demurred, and the defendant joined in demurrer.

And it was insisted, that the rejoinder was bad, for that the rejoinder ought to answer to the replication which prescribed for common in *Westfield*, of which *Chester Close in quo, &c.* is parcel, *a tempore quo tot' gran' asportat' fuit quousque aliqua pars campi præd' refeminat'*; if the defendant would not traverse the prescription, but only the time of using his common, he should have denied *quod tot' gran' asportat' fuit*; upon which the issue would have been well joined; or afterwards upon such an inducement as this should have traversed *absque hoc quod tot' gran' fuit asportat'*; for the issue was upon the affirmative and the negative, and one ought to be commensurate to the other, but here the denial of the defendant is not so.

[332]

Secondly, The rejoinder of the defendant is not a direct denial of the matter alledged by the plaintiff, but by inference; the plaintiff says, that all the grain was carried off the ground: The defendant says, that *Pratt's Nathan* was parcel of the field where two loads of vetches remained; this is evidence, and by consequence infers, that all the grain was not carried, but is not a direct negative to the matter alledged by the plaintiff;

iff; and a plea which is argumentative is not good. (1) Co. Lit. 303. a. Dy. 357. b. (a) *Yelv.* 223.

WALL v.
FULWOOD.

(a) 1 Brownl.
222. 1 Bullst.

214. S. C. March. 207. Sav. 86.

Thirdly, If this is a negative to the plaintiff's affirmative, then the defendant ought to have concluded to the country; for when there is a direct negative and affirmative, there is a full issue, and the conclusion ought to be to the country. *Yelv.* 137. (b) 1 *Saund.* 337. 2 *Saund.* 190. (c)

(b) 1 Brownl.
103. S. C.

(c) 1 Mod. 289.

2 Keb. 702. S. C. Raym. 98. 1 Sil. 215. 1 Keb. 759. 766. S. C. Cro. Car. 164. Dyer 122. 2. 3 Salk. 208.

Fourthly, The plaintiff cannot answer any thing to this rejoinder, for if he says, that two loads of vetches did not remain upon *Pratt's Nathan tempore quo, &c.* this would be a departure; for by his replication he had said that all the grain was carried out of all the field, now that it was carried out of one part only; and if it were found that the two loads of vetches were carried, this verdict would be immaterial, for there may be grain growing on other parts of the field.

(1) An argumentative plea shall be aided by verdict or on a general demurrer. Al. 48.

Mudge *verf.* Mudge. In C. B.

Case 169.

THE following case was referred by the Lord Chancellor to the Judges of the Common Pleas for their opinions.

A covenant, tho' good in its creation, may be extinguished afterwards by the death of the

covenantor, to whom the covenantee was heir. Vin. Abr. Tit. Covenants. (O.) pl. 20.

Edmund Mudge by indenture dated the 30th of January, 1692. between himself on the one part, and *Joan Mudge* his wife of the other part, for natural love to the said *Joan Mudge* his wife, by these presents doth give, grant and confirm unto the said *Joan Mudge* all that his fourth part of *Averges, &c.* part of the manor of *King's Barfwell* in the county of *Devon*, for and during her natural life, and after her decease unto *William Mudge* his son, and to his disposing, all that his right,

VOL. I.

A a

&c.

MUDGE v.
MUDGE.

Ec. in the premisses, that he the said *Edmund Mudge* standeth seised and possessed of in an inheritance in fee-simple; but if it happen that the said *William Mudge* die without issue, then the inheritance shall remain to *Joan Mudge* and her heirs, to have and to hold the said granted premisses unto *Joan Mudge* for life, and after her decease to *William Mudge*, and to his disposing; but if he happen to die without issue, then to *Joan Mudge* his wife and her heirs, to be holden of the Chief Lord of the fee.

[334]

And the said *Edmund Mudge*, for himself, his heirs and assigns, doth covenant and grant to and with the said *Joan Mudge* his wife, and *William Mudge* his son, their heirs and assigns, that the said *Edmund Mudge*, notwithstanding any act, *Ec.* is, and at the time of executing of an estate of the premisses unto the said *Joan Mudge* his wife, and to the said *William Mudge* his son, and their heirs, shall be seised of the demesnes as of fee, to them and their heirs, of and in the premisses, without any use, *Ec.* to alter, *Ec.* and shall continue and be so seised thereof until an estate of and in the premisses shall be lawfully executed unto the said *Joan Mudge* and *William Mudge* their son, and their heirs; and that the said *Edmund Mudge* now hath good right and title, *Ec.* to convey, *Ec.* and that the said *John Mudge* and *William Mudge* shall and may from time to time quietly enjoy, and without the let, *Ec.* and that the said *Edmund Mudge*, his heirs and assigns, shall and will, at the costs of the said *Joan Mudge* and *William Mudge*, their heirs and assigns, at any time in five years do any further, *Ec.* for the better assurance, *Ec.*

Two questions arose upon this; First, whether any and what estate arose to *Joan Mudge*? Secondly whether the covenant was a binding covenant?

It was insisted, that this amounted to a covenant to stand seised to the use of *Joan Mudge* for her life; for though a man cannot covenant with his wife, *Co. Litt.* 112. a. yet this deed shall be construed to be a deed poll, as was holden in

4 *Mod.* 261. *Show. Caf. Parl.* 140. Then when a man by deed poll covenants with his wife, and *William Mudge* and his heirs, though the covenant be void as to the wife, it shall be a good covenant with *William Mudge* the son, with whom the father might make a covenant. So if a covenant be entered into with a man and his wife, the husband may declare upon the covenant to him only; and by the same reason the covenant here made with the wife and the son shall be construed to be a covenant with the son only. 2 *Cro.* 383. 2 *Mod.* 217.

MUDGE v.
MUDGE.

Supra p. 29. 47.

Then if *Edmund Mudge* by deed poll covenants for himself and his heirs, with his son and his heirs, that he grants, releases and confirms the tenement in question to the use of his wife for life, and afterwards to his son; and if he dies without issue, to his wife and her heirs; and covenants, that he is seised, and will continue to be seised till an estate be executed to them and their heirs; this shall be construed as a covenant to stand seised, &c. for it is evident, that the estate was intended for the wife, &c. and words which cannot otherwise take effect, shall amount to a covenant to stand seised. (a) 3 *Lev.* 370. 372. (b) 2 *Lev.* 226. 2 *Jon.* 105. S. C.

Words which
cannot other-
wise take effect
shall amount to
a covenant to
stand seised.
1 *Vern.* 141.
2 *Show.* 12. S. C.

(a) *Carth.* 307. 2 *Lutw.* 1205. S. C. (b) *Poll.* 523. 2 *Show.* 12. S. C.

But on the other side it was insisted, that this was intended as a grant, and being a void grant, the covenants afterwards that he was seised, and for quiet enjoyment, and further assurance, shall not be construed as a covenant to stand seised. 3 *Lev.* 306.

[335]

And it was agreed by all the Judges of the Common Pleas, that no use arose to *Joan Mudge* by this deed.

And as to the covenant, they all delivered their opinions, that the covenant was good in its creation, but afterwards by the death of *Edmund Mudge* was extinguished, the covenantees being the heir of the covenantor.

Case 170.

Sir Edward Bettison *vers.* Savage.

Upon a writ of Enquiry executed after judgment by default in prohibition, plaintiff shall have his costs. Vin. Abr. Tit. Costs. (B.) pl. 39. 2 Com. Dig. p. 542. Str. 82. 1062. Andr. 57. Fort. 343.

A Prohibition (1) was granted to the Ecclesiastical Court, upon a libel there against the plaintiff and some other Justices of the Peace in the county of *Kent*, for a disturbance made by them in the parish church of *Chislehurst* in the time of divine service; upon a suggestion, that the plaintiff acted as a Justice of the Peace in suppressing a riot made by several persons in the said church, for which the rioters were indicted at the *Kent* assizes, and found guilty.

And after declaring in prohibition, the defendant, *quoad* any proceeding since the writ of prohibition delivered, pleaded not guilty, & *pro consulti habendi* demurred; and judgment was given for the plaintiff upon the demurrer; and upon a writ of enquiry for the damages in that issue the jury found 2*d.* damages: And it was now moved by Serjeant *Whitaker*, that the plaintiff might have his costs; for when a plaintiff in prohibition recovers damages, he shall also have costs. 1 *Roll.* 516. 575. *Cro. Car.* 559. 1 *Jon.* 447. S. C.

If issue be joined, whether the defendant has proceeded since the prohibition granted, and a verdict be found for the plaintiff, the plaintiff shall have damages (a) 2 *Jon.* 128. *Ray.* 387. S. C. 1 *Vent.* 348. 350. S. C. It was resolved that the plaintiff in prohibition should have his costs where the judgment was by default, and 100*l.* damages found thereupon in *Ireland*, and though it was said by the Court that it was not usual after judgment in prohibition to proceed to execute a writ of inquiry, yet it is admitted that if a writ of inquiry be executed, and the jury thereupon give damages, the plaintiff shall have his costs.

(a) 2 *Show.* 56.
82. S. C.
[336]

And it appears by the case in *C. B. Pasch. 5 W. & M.* that where a writ of inquiry was executed after judgment by de-

(1) By the stat. 8 & 9 *W. 3.* c. 11. if he has judgment after plea or default, 3. in all suits upon prohibition, murrer, costs shall be allowed to the plaintiff,

fault in prohibition, that in such case the plaintiff shall have his damages and costs. 3 Lev. 360. BETTON v.
SAVAGE.

And the Court was of opinion that the plaintiff should have his costs, and a writ of error was brought in the King's Bench, and the judgment was affirmed, and afterwards a writ of error in parliament; but there was no proceeding thereupon, upon my persuasion that it was reasonable and agreeable to the authorities in law, that the plaintiff should have costs.

D E

Termino Pasch.

6 Geo. I. In C. B.

Case 171. Scott *versus* Alberry. Intr. Trin. 3 Geo.
Rot. 1153.

A devise of all
his estate what-
soever compr-
hends all that a
man has, real or
personal; and

when there is a surrender to the uses of his will, a copyhold estate will fall under the same
construction. 2 Eq. Abr. 301. pl. 19. S. C. 3 Atk. 493. 1 Burr. 43. 3 Burr. 1621. Vin. Abr.
Tit. Devise. (T. a.) pl. 14.

THIS was an action of ejectment upon the demise of
John Scrape for Lands in *Walthamstow* in the county of
Essex.

The defendant pleaded Not Guilty, and at the *Essex* assizes before Justice *Porvis* a special verdict was found to this effect :
That *James Scrape* was seised in fee of the lands in question, being copyhold held of the manor of *Waltham Holy Cross*, and on the 5th of *June* 1693, made a surrender in the Court of the said Manor, *ad tales usus, intention. & proposita qual. fuer, aut forent per testament. & ult. voluntat. suam in script. limitat. declarat. & express.*; that he made his will on the 16th of *May* 1694, and thereby devised in these words, *As touching the worldly estate it hath pleased God to bestow upon me, I give the same in manner following. Item, I give to my Cousin Thomas Scrape all that my parcel of land lying in Waltham Abbey (being the lands in question), Item, I give to my said Cousin Thomas Scrape, my wearing apparel, linen, books, with all other my estate whatsoever and wheresoever, not herein before given and bequeathed, and him the said Thomas Scrape I make the sole executor of this my will for performing the same,*

Thomas

Thomas Scrape was admitted, and afterwards devised to the lessor of the plaintiff and his heirs, and if *Thomas Scrape* by this devise had an estate for life or in fee, was the question.

SCOTT v.
ALBERRY.

And the Court took notice that by this special verdict it is not found that the defendant had any title as heir at law or otherwise, and then the lessor of the plaintiff being admitted, he ought to recover against him who had no title.

And this was admitted by the Counsel for the defendant, and therefore he would have moved to amend, but was restrained by this doubt in point of law.

And therefore the Court heard Counsel as to the question on the will; and Serjeant *Selby* argued, That *Thomas Scrape* had by this devise an estate in fee; for it appears that the testator intended to dispose of all his estate; as to the worldly estate, &c. *I give the same as follows*, and though a devise to a man generally passes only an estate for life, yet when the deviser adds, that he intends him all his estate whatsoever and wheresoever, this carries him a fee. Where a man devised all his estate to his wife, it was adjudged she had a fee. (a). 1 *Rol.* 834. *f.* 12. So 3 *Mod.* 45. So in the case of *The Earl of Bridgewater* vers. *The Duke of Bolton*, a devise of all his real and personal estate was holden a fee. 1 *Salk.* (b) 236. So in *Hopewell* and (c) *Ackland*, 1 *Salk.* 239. the devise was of his manor of *B.* if his daughter died without issue, to his brother and his heirs. Item, *I give to my brother all my lands, tenements, and hereditaments.* Item, *I devise all my goods, chattels, money, debts, and whatsoever else I have in the world not before disposed of, to my brother A. paying my debts and legacies;* and though the last clause was coupled with personal things, yet it was resolved that these words, *whatever else I have in the world*, gave the fee and inheritance of all his estate.

Supra, p. 167.

(a) *Style*, 282.
293.

(b) *Holt*, 281.
6 *Mod.* 306.
1 *Eq. Abr.* 177.
pl. 17.
(c) *Supra*, p.
164.

To which the Counsel for the defendant answered, that the cases mentioned were consistent with the present case, though the devise to *Thomas Scrape* should be construed only an estate

SCOTT v.
ALFERRY.

for life; for by the case 1 *Rol.* 834. it appears, that the devise was of all his estate to his wife, paying his debts and legacies, and that his debts amounted to 40*l.* and his personal estate but to 5*l.* and then without doubt it would be a devise in fee. So the case 3 *Mod.* 45. was, that *J. Reeves* by his will said, *I bear J. Reeves is inquiring after my death; but I am resolved to give him nothing but what his father hath given him by his will; I give all my estate to my wife;* and the resolution in this case was founded upon the antithesis in these words, *I am resolved to give nothing to J. Reeves*, who probably was his heir at law. So in the case of the Earl of Bridgewater, 1 *Salk.* 236, 6 *Mod.* 106. the Court took notice of the words *all my estate real and personal*; for *Holt* said, the word *Estate* is *Nomen Generalissimum*, which is subdivided into two species, real and personal; and therefore when he enumerates both species, though the words are conjoined with personal things, all passes; but there it seems to be agreed, that if the estate had been mentioned generally, being coupled with chattels only, nothing would have been comprised but the personal estate.

(a) *Supra*, [252.

And therefore the case *Cro. Car.* 447. (a) was urged by the Counsel for the heir at law; where a man devised all the residue of his goods, leases, mortgages, estates, debts, household-stuff, bonds, and other things whatsoever of which he was possessed, to his wife; and it was resolved, that his mortgages in fee past to her but for life; and this case was agreed to be law, for the word *estate* was mentioned without the difference of estates, as here, 6 *Mod.* 108.

So the case of *Hopewell* vers. *Ackland* was founded upon this reason, that the testator had given to his brother *all his goods, chattels, and debts*, which comprehend *all his personal estate*; and therefore when he adds, *whatsoever else I have in the world*, that imports something more than his personal estate; and there he devises many legacies in fee for charities, and therefore when he devises to his brother, he paying his debts and legacies, it was probable that he intended the inheritance for him who was to pay the charities for ever.

And

And therefore it was urged, that the present case went farther than the case mentioned; for here he gives only his apparel, linen, books, with his other estate, which must be construed with his other estate of the same nature, and not an estate of a higher nature.

SCOTT v.
ALSBARY.

Monasteries, colleges, &c. surrendered or forfeited, or which by other means should come to the Crown, did not extend to those which came afterwards to the Crown by Act of Parliament. So Colleges, Deans, and Chapters, &c. and other Ecclesiastical Persons, by the statute (a) 13 Eliz. does not extend to Bishops. 2 Co. 46. a.

Godh. 399.
1 Jon. 186.

(a) Stat. 13
Eliz. c. 10. l. 3.

Then here the estate was copyhold, which passes by the surrender, not by the will; and when he surrenders to such uses as should be declared and expressed by his will, and in the clause by which he devises the copyhold, he gives it to *Thomas Scrape* only, without saying any thing of his heirs; it would be a forced construction, that the words, *with my other estate not before bequeathed*, should enlarge the estate before expressly limited to *Thomas Scrape*; and after these words he adds, *and him I make my executor for performing my will*, which words import, that he intended nothing for him by this clause, except such estate as belonged to an executor.

1 Vern. 45.
Prec. in Cham.
37.
Vin. Abr. Tit.
Copyhold.
(W. c.) pl. 9.

But the Court held, that when he gave all his estate whatsoever, that comprehended all that he had, real or personal estate; and when he had surrendered to the uses declared by his will, the will shall have the same construction as if it had passed the land itself. *Adjournatur*.

2 Vern. 697.
Forr. 110. 284.
Prec. Ch. 264.

But afterwards the plaintiff was admitted to take judgment,

Case 172. *Wagstaff vers. Rider and Travell.* Intr. Trin.
5 Geo. Rot.—In C. B.

No one can maintain an action for nonseafance of a thing contrary to common right, without alleging a prescription.

IN an action upon the case the plaintiff declared, *Quod cum idem quer. tertio Maii 1713. fuisset & adhuc est possessionat. de & in uno messuagio in Newport, ac ratione inde per tot. tempus præd. habuit & de jure habere debuit communiam pastur. in quodam communi campo vocat. Buryfield pro duobus spadon. a tertio die Maii usque fest. Sancti. Mich. prox. solvend. pro quolibet spadon. 1s. 8d. proprietar. firmar. vel occupator. ejusdem campi: Cumque præd. campus vocat. Buryfield contigue adjacet al. campo vocat. Pitwellfield, cumque defend. dicto tertio die Maii fuerunt & bucusque sunt tenen. & occupator. præd. communis campi vocat. Buryfield, ac ipsi & omnes al. tenen. & occupator. præd. campi vocat. Buryfield, a tempore, &c. reparaver. fensur. int. Buryfield & Pitwellfield ne occurrer. personar. in Buryfield communiam habentium evaderent in Pitwellfield & exinde in terras qd inde adjacen. prædicti defend. prædicto tertio die Maii & abinde bucusque sepes int. Buryfield & Pitwellfield permiser. fore in decursu, per quod duo spadon. ipsius quer. quarto die Maii 1713. & abinde bucusque inter præd. tertium diem Maii & Mich. quolibet anno diversis diebus & vicibus depascen. & communia sua præd. in forma præd. uten. & Buryfield in Pitwellfield præd. & abinde in al. campos diversor. personar. prope adjacen. evaser. & danum ibidem fecer. &c.* To this declaration the defendants pleaded *quod non fuer. tenen. seu occupator. præd. campi vocat. Buryfield.* To which the plaintiff demurred, and shewed for cause that this was a plea amounting to the general issue; and the defendants did not maintain their plea, but took exceptions to the declaration, that the plaintiff did not shew any title to common by prescription, but only says, *habuit & habere debuit communiam pastur. &c.* for though this is sufficient in an action on the case by one who has right of common against a wrong-doer, yet when the plaintiff charges the defendant for nonseafance of a thing against common right, it is not sufficient to say that the defendant ought to do it, but by what right he

he is bound to do it; as in action upon the case for not repairing fences, it is not sufficient to say, *quod def. reparare debet*, but the plaintiff must alledge an express prescription for the repairs; and so it was resolved (a) 1 Salk. 335. *Starr* verf. *Roodby*. (1) And though here a prescription were alledged for the defendant to repair the fences between *Buryfield* and *Pitfield*, yet this prescription runs only between the owners of those two fields; the owner of *Pitfield* may demand, that the defendant shall repair the fences between him and *Buryfield*, but the plaintiff who has common in *Buryfield* cannot demand it, at least if he has right of Common only by licence or contract with the defendant; for it does not appear that he has any more right of common than at the will of the defendant or some other. A commoner cannot have a *Curia claudenda*. *F. N. B.* 128. For this action does not lie but for him who was tenant of the freehold, and also tenant of the soil; and therefore the plaintiff here cannot maintain an action of the case against the defendants, without shewing an express lien between the plaintiff and the defendants to inclose the common for the benefit of the commoner. It is laid down by *Holt*, Ch. J. in 1 Salk. 16. that every one who would maintain an action on the case must have a particular right, or shew special damage. An action upon the case does not lie for the owner of an ancient messuage in a vill, who claims by prescription to have a passage in the ferry, toll-free, against him who is to repair the ferry; for he has no right to demand it without special damage. 1 Salk. (b) 12. And here the plaintiff, though he hath special damage, hath no right to his demand without alledging a prescription for it.

WAGSTAFF v.
RIDEA.

(a) 11 Mod.
168. S. C.

Supra, p. 59.

(b) 3 Mod. 289.
1 Show. 243.
255.
Carth. 191.
Comb. 180.
Holt. 6. S. C.

And afterwards judgment was given for the defendants.

(1) This case is differently reported the prescription was not sufficiently in 11 Mod. p. 168. where it is said laid, that the Court seemed to incline that

D E

Term. Sanct. Mich.

7 Geo. I.

Case 173.

Gally *vers.* Serjeant Selby. In Canc.

A mortgagee shall not be allowed to present to a living which becomes vacant, because nothing can be taken for it, but shall be looked upon as a trustee for the mortgagor or his grantee, and shall present such person as they shall name. 1 Str. 403. S. C. *Infra*, p. 609. Powell on Mort. p. 227.

CHARLES *Stafford* seized in fee of several lands in the county of *Bucks* and of the advowson of *Warrenden* in gross, by lease and release dated the 23d and 24th of *April* 1696, conveyed the lands to trustees and their heirs, to raise 500*l.* for *Samuel Stafford* his brother, and his other brothers and sisters, and afterwards by lease and release bearing date the 29th and 30th of *March* 1696 (but executed after the before-mentioned conveyance to the trustees for raising portions for his brothers and sisters) conveys the same lands, and by indenture dated the 3d of *April* 1696, conveys the said advowson to Serjeant *Selby* and his heirs.

On the 10th of *March* 1705, *Charles Stafford* grants the next advowson to *Peter Gally*; in 1706 *Charles Stafford* died, and *Samuel Stafford* exhibited his bill in equity against *Selby* to be let in to a redemption of his estate. *Selby* insisted that he was an absolute purchaser; but upon hearing the cause in 1707, it was decreed that *Selby* (a) was only a mortgagee, and that *Samuel Stafford* should stand in the place of the afore-mentioned *Charles Stafford*, and should be admitted to redeem, and that *Selby* should account for the profits received by him since the conveyance, and that security should be given to redeem, &c.

(a) 2 Vern.
589.

On

On the 4th of July 1709, *Gardiner* articted to pay 18,000*l.* for the lands and the advowson, which were conveyed to *Selby*, but the account was not then settled by the Master; and now the church being become vacant by the death of *Cowne* the last incumbent, *Gally* the plaintiff, the grantee of the next avoidance, presented his clerk; *Selby* also presented his clerk, and *Gardiner* also presented his clerk. Upon this *Gally* exhibited his bill in Equity against *Selby* and *Gardiner*, and *Gardiner* also exhibited his bill against *Gally* and *Selby*, alledging that he was a purchaser for a valuable consideration, without notice of the grant to *Gally*.

GALLY v.
SELBY.

The bill of *Gally* against *Selby* (*Gardiner* now making default) came on to be heard.

And it was insisted for the plaintiff, that *Selby* was a mortgagee, and was by the former decree to be redeemed; the equity of redemption then being in *Charles Stafford*, he would have been admitted to present to the advowson, which became void pending a suit for redemption, and of consequence his grantee shall be admitted here; for the presentation not being to be accounted for in value the mortgagee shall not be allowed to present, because nothing can be taken for it or accounted for it, but the mortgagor shall present. (1)

Pre. in Ch. 71.
214.
2 P. Wms. 404.
2 Vern. 401.
549.
1 Scr. 403.
3 Atk. 559.
1 Bro. P. C. 81.
Foir. 144.

And it was agreed that the case would be so in a common mortgage, but it was said that here *Selby* was a purchaser, and continued a purchaser at the time of the grant made of the next avoidance, viz. on the 10th of March 1706, though by the decree after he was directed to account, by which he became in the nature of a mortgagee quoad the plaintiff in that suit, viz. *Samuel Stafford*, but not quoad *Charles Stafford*, for he was no party to the suit, therefore as to him the purchase

(1) Lord Hardwicke, in the case of *Mackenzie v. Robinson*, 3 Atk. 559. doubted whether a covenant that the mortgagee should present was not void, being a stipulation for something more than the principal and interest, as the mortgagee cannot account for the presentation.

GALLY v.
SELBY.

[345]

continued absolute; then the plaintiff *Gally*, who took nothing from *Samuel Stafford*, nor claimed under him, nor gave any valuable consideration for his grant, ought not to present; but *Selby*, who has the legal interest ought to present, without the interposition of a Court of Equity. But it was decreed by the Lord Chancellor, that *Selby* was only a mortgagee from the beginning, and though *Samuel Stafford* was plaintiff in the suit, yet he came in under *Charles Stafford*, who had the equity of redemption, and therefore when the Church became vacant he was to have the advantage of presenting, and as he had granted the next avoidance, his grantee stood in his place, and *Selby* is only a trustee for him; and it is not material whether he is a purchaser of the grant, or not; for if the grant were without any consideration, it would be good and sufficient to intitle him to the presentation; and therefore it was decreed that the presentation by *Selby* and also by *Gardiner* was void, and that *Selby* should present such person as the plaintiff should name.

I was Counsel for the plaintiff.

Case 174.

Anonymous. In Canc.

Upon a settlement of lands to be sold in trust for several purposes, the residue is given to *B.* and his heirs, reserving only 200 *l.* to be paid to such person as the donor should by writing under his hand direct, who died without any such direction, the 200 *l.* will go to his heir, and not to *B.* or his assigns. Preced. in Ch. 162. 542. 2 Vera. 645. Forr. 79.

A MAN seised in fee made a settlement of lands to trustees and their heirs, upon trust that they should sell the lands, and pay out of the money arising therefrom such particular sums to such particular persons, and the residue (after the sum of 200 *l.* to be paid to such person as he by any writing under his hand should direct) to *B.* his executors or administrators, and afterwards died without any direction for the payment of the 200 *l.* It was resolved that *B.* should not have the 200 *l.* but the heir of him who made the settlement. (1)

(1) Vide 3 P. Wms. 22. and the he has collected all the authorities upon judicious note of the Editor, in which the subject.

Tasbmaker qui tam, &c. vers. Hundred of Ed- Case 175.
monton. In C. B.

THIS was an action upon the statute 13 Edw. 1. (a) against the *Hundred of Edmonton de placito quod cum præd. Tasbmaker fuit possessionat. de duabus peciis auri cunit. vocat. Guineas, valor. 1 l. 1 s. separatim, ac fuit possessionat. de bonis & catallis sequen. ut de bonis propriis, (viz.) a silver watch, a gold watch and chain*, a pair of ear-rings, and a diamond necklace, & sic possessionat. existen. quidam malefact. ignot. 10 Apr. apud Edmonton infra præd. Hundred de Edmonton insult. fecit in ipsum Tasbmaker & Juditham uxor. ejus tunc præsen. & præd. two Guineas de eodem Tasbmaker & prædicta bona & catalla de præd. Tasbmaker & Juditha uxor. ejus tunc præsen. felonice cepit, &c.*

An action lies upon the stat. 13 Ed. 1. against the hundred for a robbery committed on a Sunday, notwithstanding the stat. 29 Car. 2. if it appears that the person robbed was going only to his parish church. Vin. Abr. Tit. Robbery (C.) pl. 3. 1 Str. 406. S. C. 3 Com. Dig. 477. 1 Brownl. 156. Godb. 280.

Cro. Jac. 496. 2 Rol. Rep. 46. S. C. 3 Bac. Abr. 67. 2 Burn's Ecc. Law, 389. 1 Gibb. Cod. 239. 4 Burn's Just. 117. Bull. Ni. Pri. Edit. 1790. p. 184. (a) 13 Edw. 1. St. 2. c. 6.

Upon Not Guilty pleaded at the trial before King Ch. J. on the 30th of November at Westminster, it appeared by the evidence that *Tasbmaker* married the daughter of Mr. Gould, who lived at *Edmonton*, and had continued with his wife at the house of Mr. Gould from the first of March precedent, and that upon the 10th of April, being a Sunday, *Tasbmaker* and his wife, and Mr. Gould were in his coach, going from Mr. Gould's house to *Edmonton Church*, two miles distant, and by the way were robbed, and the goods before-mentioned taken from *Tasbmaker* and his wife.

[*346]

And it was insisted, that the action was not maintainable since the statute 29 Car. 2. cap. 7. which enacts, That if any travelling on the Lord's Day be robbed, the Hundred shall not be charged for the robbery, &c.

But it was answered, That going to the parish church could not be called a travelling within that statute, which was

TASKMAKER
v. EDMONTON
HUNDRED.

(a) St. 1 Eliz.
c. 2. s. 14.

made for the better observation of the Lord's Day, and confirms the statutes made for the publick exercise of religion, and by stat. (a) 1 Eliz. every one is to resort to his parish church on the Lord's Day.

But the travelling prohibited by this act was such as tended to the profanation of that day, and the Hundred by the statute is liable to the King, though the party could not have an action where he was robbed on travelling, &c. and therefore the bar to the action was intended as a penalty, but such penalty can never be supposed to be intended against a man who is going to his parish church.

And afterwards upon a motion the Court declared that the action well lay; though perhaps it might have been otherwise if he had been travelling for his pleasure. (1)

(1) As to the manner of raising the hue and cry, and what is to be done to take advantage of suing the Hundred for the robbery, see 2 Hale's P.

C. p. 100. St. 27 Eliz. c. 13. St. 8 Geo. 2. c. 16. St. 22 Geo. 2. c. 24. 2 Will. 112.

Case 176. East-India Company *vers.* Atkyns. In Canc.

A man may waive a privilege, though he is not obliged to discover what will subject him to a penalty.
1 Str. 168.
S. C.

THIS was a bill for a discovery of a private trade carried on by the defendant, who was supercargo of the *Stringer Gally*, sent by the Company on a voyage to *Canton* in *China* in the year 1715. and from thence to return to *England*, and setting forth, that it was agreed between them and the defendant, that he should go supercargo for the Company in the said ship, called the *Stringer Galley*; that he should take several goods from the ship called the *Purston Galley*, and then to proceed to *China*, and there take in goods for the Company, &c. and that the defendant covenanted, that he would not use any private trade during the voyage, and that if any bill in Chancery should be brought against him, that he would answer thereto, and not plead the Acts of Parliament which create any penalty or forfeiture in bar to such discovery; and then charges, that he failed to the

Downs

Downes, and there took in goods for the Company from on board the *Purston Gally*, and from thence proceeded to *Canton* in *China*, where he privately sold the Company's cargo, and with the produce of such cargo bought other goods, and disposed of them in his return at *Lisbon* in *Portugal*, and part was carried by the *Succest*, and part by the *Lemon Galley* to *Holland*, &c. And offering to waive all penalties, &c.

EAST INDIA
COMPANY v.
ATKINS.

The defendant, as to so much of the bill as seeks a discovery of goods exported without licence, or sold before the return of the ship at *Lisbon*, or elsewhere, pleads the statute 9 & 10 W. 3. c. 44. and the stat. 6 Anne, c. 3. by which, if bulk be broke before the return of the ship, the ship and goods shall be forfeited, &c.

And Mr. *Vernon* argued, that this plea was sufficient; for by the stat. 9 W. 3. the penalty is the loss of ship and goods, and the double value of the same, one fourth part to the prosecutor, and the other three fourths to the *East-India* Company, and therefore though the waiver might be sufficient, as to the part given to them, yet as to the other fourth part of the ship, and double the value, the plaintiffs are not intitled: this they seemed apprehensive of, and for that reason alledge, that they have exhibited informations, without saying when, or for what goods, which they ought to have shewn particularly, and expressly setting forth the informations themselves, to shew that they were for the goods in the bill inquired after, if they would have entitled themselves as prosecutors to the other fourth part; but if they should be entitled to the forfeitures upon the stat. 9 W. 3. c. 44. yet the forfeiture by the stat. 6 Anne, c. 3. is given, one moiety to the Crown, and the other to them who will sue or shall seize, &c. wherefore to this penalty they appear not to be entitled; and then we are in the common case, where a discovery is prayed which will subject the defendant to a penalty, in which case the Court will not oblige the defendant to answer; a Court of Equity will not subject persons to penalties, for it relieves against them.

[348]

EAST-INDIA
COMPANY v.
ATKINS.

But it is said here that the defendant covenants to answer to any bill in Equity, and not to plead or demur; but such covenants are of dangerous consequence, and here will subject the party to the payment of 90*l. per cent.* to the Company by way of damage, (for so the covenant runs) which is a mulct as great as the forfeiture.

The manner of obtaining it was hard; when the defendant was ready to set fail, he must then execute this charter party, or not go. But this is said to be no more than what the Company has always practised; yet there is also a covenant, that if the ship miscarries the party shall lose his wages; which as often as brought into question has been set aside, for they are entitled from port to port to receive wages, to such port where the cargo was unladen, and such covenant is unreasonable.

A covenant, that if the ship miscarries, the party shall lose his wages, is unreasonable.

2 Vern. 212.

728.

2 Show. 283.

[349]

No consideration is pretended for this covenant, but the Company's undertaking that they shall not be subject to any forfeitures, which the Company is not able to make good.

A mortgagor may redeem his mortgage, even though he has covenanted, or taken an oath not to redeem.
1 Vern. 215.
1 P. Wms. 269.
Infra, p. 351.

The person covenanting here doth not pretend or pray to have relief against his covenant; but the plaintiffs would have a specific performance of it, which is not so proper in a Court of Equity; for a difference hath always been taken between a circumstance of fraud to be relieved against a covenant, and the praying a specific performance of it. If a man makes a mortgage, and covenants not to bring a bill to redeem, nay, if he goes so far, as in *Stiffed's* case, to take an oath that he will not redeem, yet he may redeem. (1)

(1) It is laid down in Mr. Powell's useful Treatise on Mortgages, vol. 1. p. 128. that "the right of redemption is considered in Equity as inseparably incident to every contract founded on a mortgage, and can no more be restrained than the power of tenant in

see simple, to alien generally, or of tenant in tail to suffer a recovery; it being a maxim, that the same estate or interest cannot be a mortgage at one time, and at another time cease to be so."

If a man borrows money, and covenants, that if the interest be not paid at the day, it shall carry interest, yet a Court of Equity will relieve; though he may be said as much to waive the benefit of a Court of Equity in those cases as here.

EAST-INDIA
COMPANY v.
ATKINS.

1 Vern. 194.
Infra, p. 351.

It is indeed a covenant of an extraordinary nature, that he shall not make part of his defence; if he may be abridged of one part of his defence, why not of the whole?

Indeed, in a covenant to suffer a common recovery, it is agreed what defence shall be made, and what the parties shall do; and if this be allowed, the defendant may at another time be obliged to make default, that the bill may be taken *pro confesso*.

The covenant is, that the defendant shall not plead nor insist on the penalties, to avoid a discovery. But suppose he does, is the Court bound? Will they refuse to regard his plea, and pass over the merits which the law allows him to insist on? What has a Court of equity to do with a covenant, unless it be executory, to pray a specific performance of it; but can there be a specific performance here?

The defendant covenants not to plead this matter, but he has pleaded it; the plaintiffs may take what advantage they can at law, but a Court of Equity will not interpose, especially to do what is contrary to the design of a Court of Equity, *viz.* to relieve against forfeitures and penalties.

[350]

The rule, that no person shall be compelled to subject himself to penalties and forfeitures, is founded on natural right and justice: it is a rule which hath been observed inviolably without exception, till this attempt; therefore, as we cannot be acquitted by the Company from these forfeitures, it would be a monstrous thing in a Court of Equity to subject us to them; and the rather, where it is a strain upon the allegation of the plaintiffs, who alledge, that they are apprehensive of an injury from the defendant, though the proceedings shew that they never made a better voyage, having gained 200 *l. per cent.*

EAST-INDIA
COMPANY v.
ATKYN.

profit. Their whole complaint is conjectural and groundless, and seems to have no foundation, and hath no oath to support it.

If they have any ground, they have their remedy at law, and the defendant asks no relief in Equity against the covenant.

Sir *Thomas Powis* on the other side argued, that the defendant was not within the penalty of the stat. 9 W. 3. which prohibits all persons except the Company, and their servants or agents, to trade or carry goods to the *Indies*; the defendant is the servant of those who may trade, and so not subject to the penalty of that act.

But if, in respect to those goods exported, they be looked upon not as servants, but as traders, and so within the penalties of the act:

Yet three fourths of the penalty being given by that act to the Company, and the other fourth to the informer, they may alledge that they have exhibited an information, whereby they will be entitled to that fourth, and then waving the benefit of the penalties they are entitled to, they are in the common case; as where a person waves the forfeitures of the treble value, and prays a discovery of tithes; or where a man waves the penalty of the statute, and prays a discovery of timber felled. And if the penalties of this act can be waived, and a discovery of the outward-bound voyage prayed, then the plea which covers the discovery of this is ill.

As to the discovery prayed by the bill in relation to the homeward-bound voyage, that stands upon the statute 6 Anne c. 3. where the moiety of the penalty is given to the Crown, which therefore will stand upon the covenant of the defendant, not to insist on this matter by way of plea.

And may not a man covenant not to commit a fraud, or to discover it when committed?

It is founded on the consideration of being admitted to the benefit of all the profits to which he may be intitled as supercargo; so that it is a lawful covenant, and founded on a consideration. Then it is a covenant which goes along with a trust, and such a trust as none would commit to another, unless he could come to the knowledge how it is performed; but it cannot be known without the discovery of the defendant, it is a transaction in a ship at sea.

A mortgage is in its nature redeemable, and therefore a ^{Supra p. 349.} covenant not to redeem is unlawful. So is a covenant to pay interest upon interest, for simple interest is a reasonable compensation; but this covenant hinders no one of his right, but only tends to prevent the defendant from defrauding the plaintiffs.

It is said that a man hath a right to plead or demur, but may he not waive such a right? may he not covenant to give judgment by default, to release errors, to suffer a recovery by default, and will not a Court of Equity compel the performance of these?

Lord Chancellor : The plaintiffs shew not when any information was exhibited, or for what, but the defendant must take their word for it; if a person pleads a former suit depending, he must shew when and for what, that the Court may see that it is for the same cause.

[352]

But as to the covenant it must be considered, that it is in a case where it is morally impossible to get a discovery but from the defendant himself, and it is the more reasonable to get it, since it relates to a fraud where the plaintiffs are prejudiced by the defendant, and ought to have amends; and the defendant had an opportunity of doing the wrong by reason of the trust reposed in him by the plaintiffs. It is not a covenant to restrain a Court of Justice from doing right, but enables it to do right, for it causes the whole truth to be laid before the Court.

EAST INDIA
COMPANY v.
ATKINS.

And there is a difference between a defence upon an answer and a plea.

The plea is not a defence to the justice of the cause, but to the inquiry, that the defendant may conceal the truth, therefore not like the case of a covenant not to redeem a mortgage.

Infra p. 664.

It is a negative privilege which the law allows, that a man is not obliged to discover what may subject him to a penalty, but it is not a natural right, for then a discovery, if he pleased to make it, would invade that right; but surely a man may waive such a privilege, it is not what the law prohibits, but the other party hath no right to oblige him to it, but if he will discover he may, there is no law or right against it.

1 Vern. 109-128.

2 Vern. 244.
Hard. 137.

[353]

If the defendant hath not acted against his duty, his answer does him no harm, and why should the Court protect him if he hath played the knave? Though the law doth not oblige any one to subject himself to penalties, yet he may if he will, if he thinks it for his advantage. Remedy at law is vain where there can be no proof, and the bill is to discover what goods were carried, for that is the measure of their damage.

Moseley 74.

The plea was over-ruled.

N. B. There was afterwards an appeal to the House of Lords, but the matter was compounded.

Case 177.

Fowler *vers.* Blackwell & al'. In C. B.

No one shall take against the heir without an express devise to him.

Vin Abr. Tit. Devise (C. b.) pl. 17.

3 Burr. 1620.

IN an action of ejectment tried at the *Essex* Assizes before Justice *Eyre*, upon the demise of one *Edward Pate*, the case was this: *Richard Warner* seised in fee of the lands in question had two sons *Richard* and *George*, and by his will devised in these words, (*viz.*) *I give to my wife Jane all my freehold lands in Canenden in the county of Essex*, being the lands in question) and after some other bequests he says, *I give to my son George my freehold lands in Canenden after my wife's decease;*
and

and if it shall happen that my son George should die before he attain the age of 21 years, then the said lands shall descend to my son Richard and his heirs for ever; Richard was the eldest son and heir of the testator, George was his younger son by a second wife; George attained his age of 21, and by his will devised the lands to his sister, the wife of the defendant, and her heirs, and then died in the life of Jane his mother.

FOWLER v.
BLACKWELL.

The lessor of the plaintiff claimed under Richard; and it was referred to Mr. Justice Eyre, whether George had an estate in fee or only for life; and it was insisted that George took a fee, for if he had only an estate for life he took nothing, and the devise that Richard his heir should take if George died under age, imports that he should not take if he did not die under age; and so was the opinion of Saunders 2 Saund. 388. A devise to the heir after the death of B. gives an estate to B. by implication. 13 H. 7. 13 b. Vaughn. 264. 1 Leon. 257. Dal. 44. 3 Leon. 55.

1 Vern. 65.

Moore 7. pl. 24.
Infra p. 373.

But by J. Eyre here is no devise to the heir of George, and no one shall take against the heir without an express devise to him.

Sopra p. 168.
254.

[354]

Judgment was given for the plaintiff.

Pickering *vers.* Appleby. In C. B.

Case 178.

THIS was an action of *Assumpsit*, for 580*l.* for ten shares in the stock of the Governors and Company of the Copper-Mines in England, transferred and sold by the plaintiff to the defendant.

Whether a contract for ten shares of stock, is within the Stat. 29 Car. 2. which enacts, that no contract

for the sale of any goods for the price of 10*l.* or upwards shall be allowed to be good except the buyer shall accept, &c. 2 Eq Abr. 50. pl. 27. S. C. Vin. Abr. Tit. Contracts (H.) pl. 46. Stoe (A.) pl. 12. 2 P. Wms. 307. Sel. Cases in Chan. p. 41.

And there was another count in the declaration for goods and merchandises sold and delivered.

And another Count, that the defendant, in consideration that the plaintiff took upon himself to deliver and transfer ten

B b 4

shares

PICKERING v.
APPELBY.

shares of the said stock to the defendant the next transfer day,
super se assumpsit solvere 580l. *super translation. inde, &c.*

(a) St. 29 Car.
2. c. 3. s. 17.

The defendant pleaded *Non Assumpsit*; and upon the trial there was proof made of a contract for ten shares of the said stock for 580 l. But there was no *Memorandum* in writing of the contract or any earnest paid; and there was a doubt upon the words of the stat. (a) 29 Car. 2. whether the plaintiff should recover. The statute says, that no action shall be brought to charge any person upon any agreement in consideration of marriage, or upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement not to be performed within the space of one year from the making, unless the agreement upon which such action shall be brought, or some *Memorandum* or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised; and in another clause, no contract for the sale of any goods, wares and merchandises for the price of 10 l. or upwards shall be allowed to be good; except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some *Memorandum* or note in writing of the said bargain be made and signed, &c. as above.

[355]

And upon the trial before King C. J. it was doubted, whether the shares in the stock of this company were within the purview and intent of that statute; and therefore it was made a case, and argued before the Court of Common Pleas; and afterwards at *Serjeants-Inn* before all the Judges of *England*.

And I insisted at *Serjeants-Inn*, that the words of the statute extend to all contracts for the sale of goods, wares or merchandizes, and shares in such a corporation are merchandize, *Merx est quicquid vendi potest*; every personal thing for which merchants traffick may be called merchandize.

Win. Abr. Tit.
Actions (K.) pl.
8. &c. 9.
1 Com. Dig. 219,

Trover lies for muscheats, monkies, parrots, for they are merchandise. 2 Crv. 262, 1 Bulst. 95. S. C. And for negroes,

groes, (1) for the same reason. 2 Lev. 201. (a) 3 Lev. 366.

PICKERING v.

APPELBY.

(a) 3 Keb. 785.

S. C.

1 Freem. 451.

And though there was a doubt whether trover lay in the case of *Smith and Gould*, (b) yet the doubt arose only on the nature of the property of a negro. So the word *Goods* is of a large extent; if a man grants *omnia bona sua*, all his personal chattels pass. 2 Roll. 58.

(b) 2 Salk. 666.

2 L. Raym. 1274.

S. C.

1 L. Raym. 147.

5 Mod. 187.

Emblements not severed may be levied upon a *Fieri fac' de bonis & catallis*. So trover lies for a bond. 2 Cro. 638. *Cro. Car.* 262. 1 Roll. 5. l. 20.; and for Letters Patent. *Hard.* 111. And the plaintiff may declare, that he was possessed *de bonis & catallis sequen'*, (*viz.*) *uno script' obligat'*, *uno warranto*, &c. 4 Mod. 156. But it cannot be denied, that these shares are personal estate, they may be attached.

Supra p. 204.

Trover lies for

a bond.

1 L. Raym. 275.

2 Salk. 654. S. C.

2 Bull. 313.

Cro. Eliz. 723.

cont.

If a man trades in them, he shall be a bankrupt; so ruled in the Court of King's Bench, in Sir *John Wolstenholm's* case; and tho' this judgment was declared illegal by the statute 13 & 14 Car. 2. c. 24. that seems to be because Sir *John Wolstenholm* did not traffick in them, but only had a stock in the *East-India* Company, as any other gentleman might have.

[356]

But there the proviso is, that every person who shall trade, traffick or merchandize, in any other way or manner than in the said Royal Fishing, *East-India*, or *Guinea* Company, shall be liable to a commission of bankrupt.

Bull. Nl. Pd.

p. 38.

And in the stat. 9 & 10 W. 3. c. 44. s. 74. a clause is inserted, that no member of the *East-India* Company established by that act, shall be liable to be a bankrupt in respect of his stock there only; and that no stock in that company shall be liable to a foreign attachment; by which clauses it appears that the Parliament thought it reasonable by express words to

(1) *Holt* Chief Justice declared, in the case of *Chamberlain v. Harvey*. 1 Raym. 147. that trover would not lie for a negro, and denied the authority of *Butts v. Penny*. 2 Lev. 201. It was adjudged however in the Common Pleas in the case of *Gelly v. Cleve*, that trover would lie for negroes, upon the ground of their being heathens, and that therefore a man might have property in them. It was said that the Court, without averment made, would take notice that they are heathens. 1 Ld. Raym. 147.

avoid

PICKERING v.
APPLANT.

avoid such a construction, as otherwise might have been made concerning persons who traffick in such stocks; for if a man does not traffick, but deals only on a particular occasion, this does not make him a bankrupt.

(a) 3 Keb. 451.
1 Freem. 391.
S. C.
1 Show. 270.
(b) 2 Keb. 487.
306. 308. S. C.

As if a man provides for the victualling of the Navy,
1 Vent. 270. (a) or has a part in a ship, but does not freight it.
1 Vent. 29. (b). 1 Sid. 411. S. C.

The intention of the act was to prevent frauds and perjuries, which was equally hazardous in contracts for stock, as for land or any other thing; and therefore the intention of the Legislature seems to be aimed at all contracts; if made for lands, by the prior clause it is provided, that the agreement or some *Memorandum*, or some note thereof, shall be in writing, &c. and by the latter clause it is provided for in all contracts for goods, wares and merchandizes; in which words it may be well presumed, that all contracts were intended to be included; and it is the more probable that stocks were meant to be included, because traffick in them was used many years before that act.

And in the case of *Nunns* against *Scipio*, Hil. 8 Feb. 1715. in Chancery, it was expressly declared by Lord Chancellor *Cowper*, that a plea of the statute to a bill for the performance of a contract for 4000*l.* *South-sea* stock ought to be allowed; which resolution is in point.

[357]

Serjeant *Whitaker* *e contra* insisted, that all contracts were not intended to be comprised within that statute; for the words make contracts above 10*l.* void, except the buyer accept part of the goods sold, and actually receive the same, or give earnest or some *Memorandum* of it be in writing; and therefore though one or other part is sufficient, yet the statute does not extend to contracts where neither one nor the other part can be performed; and therefore, where part of the goods cannot be delivered or accepted, it cannot be a contract within the statute, which extends only to such things part whereof may be delivered or accepted.

The

The transfer of stocks at the time of that statute made was unusual, and therefore it is not probable that the Legislature had that in view; and although all goods, wares and merchandizes, are mentioned in the statute, yet it does not follow that the statute shall extend to contracts for all sorts of goods; for, there are goods of which felony cannot be committed, and it is not probable that it should extend to them.

PICKERING &
APPLEBY.

This statute is introductive of a new law, and therefore is to be taken strictly, and shall not be construed to extend to stocks, or other choses in action which cannot be assigned.

To which it was replied, that though the statute says that the contract shall be void, unless the buyer accept part of the goods, or give earnest, or there be some *Memorandum* in writing; yet it is not necessary that the thing contracted for must, by this statute, be such as can be delivered into the other party's hands; it is sufficient that part of the goods be accepted, or that there be earnest, or some *Memorandum* be in writing; and therefore if the goods cannot be delivered, if there be earnest, or a *Memorandum* in writing, it is sufficient. If there be a contract for goods to be imported in such a ship, shall not the contract be within the statute, because the goods cannot be delivered till the arrival of the ship?

But if the delivery of the goods is necessary, the assignment is a delivery; and the declaration says for ten shares *vendit' & translat'*; if an assignment was made it may be accepted, and till acceptance the transfer is not complete; and though it is said, that a chose in action cannot be assigned, yet it does not follow that it is not of the nature of goods of merchandize.

[358]

1 P. Wms. 352.
1 T. R. 619.

A chose in action may be assigned by the King. *Dy. 30. b.*
2 *Cro. 82. 179.* 2 *Rol. 198.* or may be attached. 3 *Leon.*
236. *Cro. Eliz. 184. 713.* 1 *Rol. 553.* 1 *Sid. 327.*

2 Lutw. 984.
1 Com. Dig.
424.
2 P. Wms.
308.

But the Judges being divided in opinion it was adjourned.

Case 179. The King *vers.* Bishop of Hereford & al'.
Intr. Hil. 5 Geo. Rot. ——— In C. B.

In *Quare Impedit* the Bishop pleaded, that he claimed nothing but as Ordinary, and it was holden bad, for want of alledging notice of the refusal, though in a case where the Crown presented. 2 Gib. Cod. 807. 2 Burn's E. L. 342.

IN a *Quare Impedit* for the presentation to the vicarage of *Aymstry in com' Hereford*, the Bishop pleaded, that the vicarage was within the diocese, and that he claimed nothing but as Ordinary of the said Church; that the King by letters patent under the Great Seal presented *George Herbert* to be instituted, *super quo idem Episcopus ut Ecclesie præd' ordinari præd' Geo. Herbert sic præsentat' de habilitat' & idoneitat' suâ tam de moribus quam scientia in hac parte secundum Leges Ecclesiasticas adtunc & ibidem examinavit ut de jure debuit, & super hujusmodi examination' idem Episcopus adtunc & ibidem invenit & per sacrum diversar' personar' fide dign' sibi manifeste apparuit quod præd' Geo. Herbert tempore præsentation' præd' fact' & diversis annis tunc ult' elapsis fuit Ebrietati datus, Anglice a common drunkard, & communis dejurat', Anglice a common swearer, ac ea occasione per Legem Sanctæ Ecclesie fore inhabilem & personam minime idoneam fore admiss' ad aliquod beneficium cum Curâ Animar', per quod idem Episcopus ut Ecclesie ill' ordinari' recusavit admittere præd' Geo. Herbert ad Vicariam Ecclesie præd' prout ei bene licuit, & hoc parat', &c.*

[359] To this plea the Attorney General demurred, and the Bishop joined in demurrer, and exceptions were taken to the plea.

First, That the bishop says *quod ipse nihil clamat in eadem ecclesia*, whereas it ought to be *in eadem Vicar'*. *Sed non allocatur*; for he adds *nisi admissiõ', institution' & inducitiõ' Vicar ad Ecclesiam' præd'*; for though the word *Ecclesia* imports the rectory, and *Quare Impedit præsentare ad Ecclesiam* is not good for a presentation to a vicarage, *F. N. B.* (a) 326. yet the reference here is to the ordinary, who if he is ordinary of the rectory, is also ordinary of the vicarage presentative derived therefrom. And so are the precedents 2 *Brown.* 225, 226. *Rast.* 524.

(a) *F. N. B.*
8th Edit. p. 76.
2 *Ld. Raym.*
199.

Secondly,

Secondly, There is no certain averment that he was a common drunkard. *Sed non allocatur*; for *Ebrietas* *dat* with an *Anglice* is sufficient.

KING v.
HARFORD
Bishop.

Thirdly, The averment that he was, is not certain, but only *quod super examin' Episcopus invenit & per Sacrum personar' fide dign' manifeste sibi apparuit quod fuit, &c.* *Sed non allocatur*; for *Dyer* 368. 2 *Rol.* 591. it was allowed to be good, where the certificate of the ordinary said *diligentum & celerem fieri fecimus inq' per quam luculent' comperuimus & invenimus quod, &c.*

So a certificate of bastardy was allowed, which said *quod fuit mulier prout per inq' invenit*, (a) *Fitz. Bass.* 2. and there *Rolf* said that it had oftentimes been allowed.

(a) *Fitz. Abr.*
fol. 130.

So *per quam inq' invenimus esse bastard* was allowed. *Raff. Bass.* 4. (b) *Specot's Case* (c) 5. *Co.* 57. The plea was *super examination' Episcopus invenit presat' H. fore schismaticum, &c.* So in the case of *Hele* versus the Bishop of Exeter. (d) *Lutw.* 1095. So *Co. Ent.* 520.

(b) *Raff. Ent.*
105. b.
(c) *Goldf.* 35.
jenk. 268.
3 *Leon.* 198.
1 *And.* 189.
S. C. Caf. in Par.
134. *Holt.* 609.

p. 100. (d) 2 *Salk.* 539. *Carth.* 311. *Comb.* 239. 3 *Lev.* 313. 4 *Mod.* Show. P. C. 88. S. C.

Fourthly, For that the Bishop does not shew that he gave notice of the refusal; and it was argued by me, that there is a distinction between the refusal of a clerk of a common person and a clerk of the King. In the case of a common person lapse incurs if he does not present within six months, and therefore notice is necessary. *Hern. Plead.* 601. *Townf. Tables* 222. *Co. Ent.* 520.

[360]

Mall. Quare.
Imp. 119.
2 *Burn's E. L.*
p. 236.

But *nullum tempus occurrit Regi*, and therefore it is sufficient that he now informs the King of his refusal. The sole ground for requiring notice is the danger of a lapse, as appears by *P.* 18 *H.* 7. *Keil.* 49. b.

And therefore a patron may present before notice. 4 *Co.* 75. b. The plea is only an excuse for the defendant that he be not judged a disturber, and though upon a plea that the Bishop

KING v.
HERTFORD
Bishop.

Bishop claims nothing but as Ordinary, generally the plaintiff may have a writ to the Bishop presently, and the Bishop shall not be amerced, but the plaintiff for false clamour. *Hob.* 198.

So where the Bishop pleads specially, that he claims nothing but as ordinary. 38 *Ed.* 3. 2.

But it was resolved, that the plea was bad for want of notice alleged. (1)

(1) It is laid down in the case of *Hale v. Bishop of Exeter*, 2 Salk. 539.

“That if the ordinary refuse, *quia criminofus*, he need not give notice of his refusal, for the crime is as much in the consuance of the Patron as of the Bishop; but if he refuse *quia illiteratus*, he must give personal notice.”

Lord Coke in his second Institute p. 632. says “If the cause of refusal be for default of learning, or that he is an heretick, schismatick, or the like, belonging to the knowledge of ecclesiastical law, there the Bishop must give notice thereof to the Patron, but if the

cause be temporal, as a felon or homicide, or other temporal crime, or if the disability grow by any act of Parliament, or other temporal law, there no notice ought to be given, unless notice be prescribed to be given thereby.” But Dr. Burn in the 1st vol. of his Ecclesiastical Law, p. 142. declares that “in all cases it is fair and equitable to give notice to the Patron of the refusal, whatever the cause may be; for it is very possible that the person presented may be many ways unfit, and the Patron not know it.”

Depaba *vers.* Ludlow. In C. B.

When insurance is interest or no interest, the plaintiff has no occasion to prove his interest for the defendant cannot controvert that.

THIS was an action of *Assumpsit* upon a policy of insurance, where the defendant insured the plaintiff, interest, or no interest, against all enemies, pirates, takings at sea, and all other damages whatsoever. And upon the trial it appeared that the ship was taken by a pirate of *Sweden*, and was in his possession for nine days, and was retaken by an *English* man of war, and after the suit commenced, brought into *Harwich*. And the question was, whether in such case the defendant was responsible?

And it was reserved by the chief justice for the opinion of the Court; and after argument by Serjeant *Whitaker* for the plaintiff, and by Dr. *Henchman* for the defendant, it was determined for the plaintiff.

For

For though it was objected, that the insurer was only responsible where the plaintiff had a property, and that the term of insuring interest or no interest was introduced since the Revolution; yet it was said that such insurance was good, and the import of it is, that the plaintiff has no occasion to prove his interest, and that the defendant cannot controvert that.

DEPABE v.
LUDLOW.
2 Vern. 269.
717.
Prec. in Ch. 20.
Park on Ins. 260.
Millar on Insur.
214.

And though the ship was here retaken, yet the plaintiff received a damage, for his voyage was interrupted; and the question is not whether the plaintiff had his ship and did not lose his property, but what damage he sustained. (1)

2 Salk. 444.

(1) It is enacted by the statute 19 Geo. 2. c. 37. s. 1. that insurances made on ships or goods interest or no interest, or without further proof of interest, than the policy, by way of gaming or wu-

gering, or without benefit of salvage to the insurer, shall be null and void. Park on Ins. p. 262. Millar on Ins. p. 215.

The King *vers.* The Bishop of Durham, the Chancellor, Master and Scholars of Cambridge, Edward Fenwick, John Ward and Edward Fenwick Jun. Clerk.

Case 181.

THIS was a *quare impedit*, in which the Attorney General declared, *Quod Eliz. Regina seisis de Ecclesia de Simondsbourne in Com' Northum' ut de uno grosso in jure Corona presentav' J. Hodges, quodque Advocatio descendebat Jacobo Primo, &c. qui super mortem J. Hodges presentavit Cuthbert Ridley*, and that from him it descended to King Charles the First, who upon the death of Ridley presented William Kember, and from him it descended to King Charles the Second, and upon the death of Kember, John Rippon and Thomas Algood, by usurpation, presented Majors Algood; that the advowson descended to King James the Second, and that upon his abdication to King William and Queen Mary; and that upon the death of Algood, the Chancellor, masters and scholars of Cambridge, by usurpation, presented William Stainforth; that afterwards the advowson descended to Queen Anne, and from her to his present Majesty King

A grant of a manor with all advowsons, &c. thereunto belonging, will not extend to an advowson severed in ancient times, though it was appendant to the manor 300 years ago.

KING v.
Bishop of DUR-
HAM, &c.

King *George*, to whom upon the death of *Stainforth* the right of presentation appertained.

The Bishop pleaded, that he claimed nothing but as Ordinary.

Edward Fenwick sen. pleaded, That Queen *Elizabeth* was seised of the manor of *Wark* to which the church of *Symond-bourne* was appendant, and presented *Hodges*, and that the manor *ad quod*, &c. descended to King *James* the First, who presented *Ridley*, and by letters patent dated the 11th of *January*, in the 11th year of his reign granted the said manor *cum pertin.* to *Elizabeth Howard*, wife of *Theophilus* Lord *Howard*, afterwards Earl of *Suffolk* and her heirs, and that upon the death of *Ridley* the Earl of *Suffolk*, in right of his wife, presented *Kember*, and the manor descended to *James* Earl of *Suffolk*, who by indenture dated the 9th of *July* 1664 inrolled, &c. bargained and sold to Sir *Francis Ratcliff*, afterwards Earl of *Derwentwater*, in fee, who by deed dated the 4th of *September* 1665 granted the next avoidance to *J. Rippon* and *Thomas Algood*, who upon the death of *Kember* presented *M. Algood*, and that by the statute 3 *Jac.* 1. cap. 5. the university shall present to the benefice of a recusant convict, and that the Earl of *Derwentwater* being a convict, upon the death of *Algood* the university presented *William Stainforth*. That the advowson descended to *James* Earl of *Derwentwater*, who by indentures dated the 15th of *August* 12 *Anne*, granted the next avoidance to the defendant *Edward Fenwick* sen. to whom the presentation upon the death of *Stainforth* belonged, &c. *absque hoc*, That Queen *Elizabeth* was seised in gross. *Edward Fenwick* jun. pleaded that he claimed nothing but upon the presentation of *Edward Fenwick* sen.

The chancellor, masters and scholars of the university of *Cambridge* pleaded, that *Edward* the Second was seised of the manor of *Wark*, *ad quod*, &c. that it descended to *Edward* the Third, who by letters patent dated the 9th of *May* 25 *Edw.* 3. granted the advowson to the warden and college of the chapel
of

of *Windfor* and their successors, and so derived the advowson to Queen *Elizabeth*, who presented *Hodges*, and upon his death King *James* the First, presented *Ridley*, and having the manor of *Wark* also, he by letters patent dated the 12th of *January*, in the 11th year of his reign granted tot' ill' cast'r' honor' & maner' de *Wark*, &c. ac omnes advocacion', &c. omnium & singular' ecclesiar', &c. infra Com. &c. in eodem Litt' Pat' specificat' vel alibi præd' maner', &c. spectan', pertin', &c. aut ut memb', &c. unquam ante tunc habit', cognit', reputat' &c. to *Elizabeth* the wife of *Theophilus* Lord *Walden* heir apparent to the Earl of *Suffolk* and her heirs, by which she was seised of the manor and of the advowson, and upon the death of *Ridley* presented *Kember*, and so derived the advowson to *Edward* Earl of *Derwentwater*, who being a recusant convict, the University upon the death of *Algood* presented *Stainforth*, and then derived the advowson to *James* Earl of *Derwentwater* an infant, and that by the statute 12 *Anne*, *Seff.* 2. *cap.* 14. every papist or person professing the popish religion, and every infant of such papist not being a protestant, and every mortgagee, trustee, &c. of such, is disabled, &c. and the university shall present, &c. upon which the Earl of *Derwentwater* not being a protestant, but the son of a papist, &c. the presentation belonged to the university, who presented the defendant *Ward*, *absque hoc*, that King *James* the First died seised of the advowson.

KING W.
Bishop of DUR-
HAM, &c.

The defendant *Ward* pleaded that he did not disturb, &c.

To the pleas of the Bishop, *Edward Fenwick* jun. and *Ward*, the Attorney General replied, and prayed judgment with a *cessat executio*, &c.

To the plea of *Edward Fenwick* sen. the Attorney General demurred, and for not joining in demurrer took judgment.

To the University's plea the Attorney General demurred, and shewed for cause, that the traverse is not material, and that he defendant did not shew any title to the advowson; and the University joined in demurrer.

And it was argued, that by the letters patent 11 *Jac.* 1. the advowson of *Symondsbourne* did not pass, for it is not expressly

KING v.
Bishop of DUR-
HAM, &c.

named in the patent, and by the stat. 17 *Edw. 2. Præreg. Regis* c. 15. an advowson appendant does not pass by the grant of a manor *cum pertin'*, if it be not expressly mentioned. And though it is admitted by the pleadings, that this advowson was appendant to the manor of *Wark* in the time of *Edward* the Second, and the grant by the letters patent is *inter al'* of the manor of *Wark*, with all advowsons, &c. *penden' aut ut membr'*, *parcel' eorundem maner'*, &c. *unquam ante hac habit'*, *cognit'*, *accept'*, *occupat'*, *usitat'* *reputat'* *existen'*, &c.

These words cannot pass an advowson severed from the manor 300 years, though it was *ante tunc* appendant to the manor.

In the case of *Imber* and *Wiling*, *Dyer* 362. *Co. Ent.* 380. a grant of a manor with all woods, &c. *specian' aut ut membrum*, *parcel' eorundem maner'*, &c. *antehac cognit'*, *accept'*, *habit'*, *usitat' seu reputat' existen'* does not extend to woods which were not parcel thereof at the time of the grant, they ought to be parcel thereof in reputation time out of mind, &c. So 2 *Roll.* 186. *Co. Ent.* 380. A grant of a manor with all the lands, woods, &c. *specian' aut ut membr'*, *parcel'*, &c. *ante tunc habit' cognit'*, *accept'*, *seu reputat'*, may extend to woods in the hands of the King, and parcel of the manor within 17 years, but not to woods severed in antient times.

And so it was resolved by the Court,

Judgment was given for the King.

D E

Term. Sanct. Mich.

9 Geo. I. In B. R.

Rogers *vers.* Wilson.

Case 182.

THIS was an action of debt upon a bond dated the 24th of *July 7 Geo.* for 200 *l.* The defendant prayed Oyer; upon which the condition appeared to be this.

In a contract for stock, it must appear by the register itself to whose use the contract was

made. *Say. R.* 187. 2 *Lord Raym.* 1350. 1 *Str.* 585. *S. C.* 8 *Mod.* 232. *S. C.* 2 *Lord Raym.* 1515.

Whereas *Ph. Brooke*, as executor of *F. Brooke*, being possessed of 4000 *l.* lottery annuities on the 6th of *July* agreed to sell them for 4600 *l.* to be assigned and paid for before the 6th of *August* next; and whereas soon after the said *Ph. Brooke* at the request of the plaintiff and defendant, transcribed them in his own name into the *South-sea*.

Now if the defendant, in consideration of a valuable consideration, shall transfer to the plaintiff a moiety of the said stock allowed by the *South-sea* Company for the same, then, &c. And then pleaded, that the contract between the plaintiff and defendant was for the sale of *South-sea* Stock, which was neither performed nor compounded before the 29th of *September* 1721. and that neither the bond, with the condition and contract therein contained, or any abstract or memorial thereof, was registered before the 1st of *November* 1721, &c.

The plaintiff replied, that he by deed dated the 27th of *October* 1720. assigned the bond and all the benefits of the stock,

C c 2

&c.

ROGERS v.
WILSON.

&c. in the condition mentioned, to *William King* for his own proper use, who registered it, &c. and issue was joined upon the registering. And on the trial at *Guildhall*, on the 27th of *November 1722*. before Lord Chief Justice *Pratt*, it appeared upon the register of the assignment produced, that the assignment was registered, and not the bond; and the Chief Justice said, that the bond and condition which contained the contract ought to have been registered. Then a register of the bond and condition was produced, but it did not appear to whose use the contract was made; and it is not enough that it is said in the assignment, that it was to the use of the plaintiff, though the assignment was also registered, for that is only a recital in the deed of assignment; but by the (a) statute, it must appear by the register itself to whose use the contract was made. And to this opinion the Chief Justice adhered; but on the plaintiff's importunity permitted a case to be made, which was never argued; but the plaintiff commenced a new action in the Common Pleas, upon which a special verdict was found.

(a) 7 Geo. 1, St.
2. c. 8.

Case 183. Stedman, *qui tam*, &c. *vers.* Hay. In C. B.

When a prescription for a seat in a church is found by the verdict, the repairing, which is only a circumstance requisite to support the prescription, is not necessity included.

THIS was a prohibition upon a libel in the spiritual Court by the defendant, for that the plaintiff sat *in primo & tertio locis in sedili*, in the church of *Abberley* in *Worcestershire*, which places the defendant claimed, one as belonging to a messuage or tenement named *Crowlands*, the other to a messuage or tenement named *Nurtons*.

The plaintiff in his declaration in prohibition declares, that all prescriptions ought to be determined by common law; that *J. Farmer* and *Susan* his wife, in right of the wife, were seized of a messuage and lands called *Southalls* in *Netherton* in the said parish of *Abberley* in fee, and that time out of mind there had been an ancient seat in *Boreali parte Ecclesie de Abberley*, and that the said *Farmer* and his wife, and all, &c. prescribed *habere usum primi & tertii loci in sedili prae* (the second place belonging to the defendant as tenant of *Nurtons*) and because the

the plaintiff, as tenant of *Southalls*, used those seats, the defendant libelled against him in the spiritual Court.

STEDMAN v.
HAY.

The defendant pleaded, that he had a faculty granted for those places, and traversed *absque hoc quod Farmer & uxor & omnes, &c. a tempore, &c. habuer' usum præd' primi & tertii loci in sedili illo*. Issue was joined upon the traverse, and a verdict for the plaintiff.

And now Serjeant *Pengelly* moved in arrest of judgment, that the plaintiff did not alledge in his declaration any usage to repair the seats; for of common right all the seats in the church belong to the parishioners in general, who are bound to repair the church; but for the better order, and to prevent the confusion which would follow, if every parishioner sat where he pleased, the ordinary has been allowed to dispose of the seats, and no prohibition ought to be granted in such a case: But where a man has always repaired a particular seat, he may prescribe for that, and the usage of repairing is the foundation of such prescription, without which it would be void; and so it was resolved 2 *Cro.* 366. *Ny* 104. (which seems to be the same case) that if a man time out of mind had used to repair a seat in the isle of the church, and to sit and bury there, the isle shall be peculiar to his messuage, and he shall not be displaced by the ordinary, parson or church-wardens. But usage of sitting and burying, without usage of repairing, does not give any property.

1 Burn's E. L.
332.
1 Will. 326.
Sey. 31. S. C.
2 Roll. Abr. 288.

And therefore no body can prescribe for a seat in the body of the church, for it is always repaired by the parishioners. *Mo.* 878. (a) But where Sir *Bernard Whetstone* had time out of mind used to repair a pew in the body of the church, he was allowed to prescribe for it. *Hob.* 69. So a custom for the church-warden to dispose of the seats in the body of the church was disallowed, where the parishioners repaired the church. 2 *Lev.* 241. So where the isle, &c. had always been repaired at the common charge of the parishioners, the seats there shall be disposed of by the ordinary, as well as in the body of the church. 2 *Cro.* 366. And in ancient times, a

(a) 12 Co. 107.
Godb. 109. S. C.
3 Inst. 202.

STEDMAN v.
HAY.

(a) Bridg. 4.
Halm. 46.
2 Ro. Rep. 139.
S. C.

(b) 1 Lev. 71.
1 Keb. 345.
Raym. 52. S. C.
1 T. R. 428.

custom to repair was alledged in an action on the case for disturbing a man in his seat in the church. 2 Cro. 605. (a) But of later times it has been holden that there is no occasion to alledge it in the declaration, but that it is sufficient to give it in evidence at the trial; and after a verdict it shall be presumed to be well proved, otherwise the verdict could not have been for the plaintiff. (b) 1 Sid. 88. 203. And the distinction there was taken, between an action upon the case and a prohibition; for in a prohibition it was said, that custom to repair must be alledged in the declaration. And Hale thought there was good ground for that distinction, for an action upon the case is against a wrong-doer and stranger; a prohibition, against one who *prima facie* has a right. And this distinction was cited and agreed to 2 Jon. 4. 3 Lev. 73.

And it was agreed on the other side, that usage of repairing was necessary, without which there could be no prescribing for a seat in a church; and perhaps if the defendant had demurred to the declaration, it would not have been good; but when the defendant has pleaded, and traversed the prescription which is found for the plaintiff, which could not have been found unless a custom of repairing had been proved, the declaration shall be aided; as in trespass and other actions, where the declaration is uncertain or insufficient, it shall be aided by the plea of a collateral matter, and a verdict for the plaintiff. 2 Lut. 1382. 1392. 1492. 2 Salk. 662, 663.

Supra. p. 12.

And the custom to repair is only a circumstance requisite to support the prescription, and when the prescription is found, the repairing is of necessity included.

Bull. Ni Pri.
p. 219.

Afterwards P. 9 Geo. judgment was given for the plaintiff; for after a verdict it shall be presumed that a good prescription was proved.

Hughs *vers.* Clubb & al'. In B. R.

Case 184.

THIS was an action of ejectment upon the demise of *Herbert Watts*; to which the defendant pleaded not guilty; and upon the trial in *Kent*, before *Pratt* Chief Justice, the case appeared to be this:

A man devises
to his wife in
tail general, re-
mainder to J. S.
in fee, and the
wife with a sub-
sequent husband

suffers a recovery; and it was holden good against the heir of the devisor, notwithstanding the Statute 11 H. 7. c. 20.

John Watts, the ancestor of the lessor of the plaintiff, and to whom the lessor was heir, by his will dated the 30th of *September* 1684. devised the lands in question, of which he was seised in fee, to *Elizabeth* his wife, *habend'* to her and the heirs of her body.

Elizabeth married a second husband——*Cox*, and suffers a common recovery, and by indenture dated the 2d of *October* 1689. declares the uses to——*Cox*, her second husband for life, afterwards to herself for life, remainder to the heir of the survivor.

Elizabeth survived, and afterwards married *Edward Clubb*, and settled this estate to him in fee, and died without issue, and the defendant claimed under this settlement.

The question was, whether the recovery suffered by the wife was not void in this case by the stat. 11 H. 7. c. 20. which enacts, That if any woman hath or shall have any estate in dower for life, or in tail to herself or for life, in any land, &c. of the inheritance or purchase of her husband, and shall sole, or with an after-taken husband discontinue or suffer a recovery, &c. such recovery, &c. shall be void.

And this case was reserved for the opinion of the chief Justice, and by him determined, that it was not within the statute; for though it is within the letter, it is not within the intent of the statute, which extends only to cases where the husband settles lands upon his wife by way of jointure, to which the issue between them shall be inheritable.

[370]

HUGHES v.
CLUSE.

Willf. on Recov.
272.

And therefore if a husband settles lands upon himself and his wife in fee, though it be a good jointure, 4 Co. 3. yet her alienation is not restrained by the stat. 11 H. 7. c. 20. *Dyer* 248. So it was resolved *Cro. Eliz.* 524. and accordingly in *Mo.* 716.

Cruise on Recov.
p. 158.

And in 1 *Leon.* 261. *Cro. Eliz.* 2. S. C. it was resolved, that if a man seised in fee devise to his wife in tail general, remainder to J. S. in fee, and the wife with a subsequent husband levy a fine, this bars the issue; for though it is within the words of the statute, it is not within the intent of it; which was designed to prevent a wife advanced by her husband from prejudicing the issue of her husband; and that is of the same import with the present case.

D E

Term. Sanct. Trin.

9 Geo. I. In C. B.

Robinson *vers.* Mead.

Case 185.

THIS was an action of trespass for an assault and battery of the plaintiff's wife, *per quod consortium amisit*.

A plea in abatement, that the defendant was a mercer, and no

gentleman, as named in the writ, was holden good. 1 Com. Dig. 35. 1 Str. 556. 2 Ld. Raym. 1541. 2 Str. 816. S. C.

The defendant pleads in abatement, that he was a Mercer, and no Gentleman, as he was named in the writ; to which the plaintiff demurred, supposing that the exception was taken to the addition, in regard that the plaintiff had mistaken his degree, for that he ought to have shewn of what other degree he was, and that it was not enough to say that he was of such a mystery. *Sed non allocatur*; for here the defendant denies absolutely the addition given him by the writ, and then *non constat de persona*, for *Thomas Mead*, Mercer, and no Gentleman, cannot be *Thomas Mead* Gentleman. It is true that the statute 1 H. 5. c. 5. requires only that in original writs an addition shall be made of the defendant's estate, degree or mystery, and therefore it is sufficient where a defendant has several additions to give him the one or the other, or to give him the addition of his degree or mystery or both; but when the defendant has no such addition as is given him by the writ, he may plead as here, *quod non est generosus, nec suscepit, nec fuit de gradu generosi*; which the plaintiff confessed by his demurrer; and when by his plea in abatement the defendant denies the addition

ROBINSON v.
MEAD.

addition given him by the plaintiff, he is obliged by the rules of good pleading to shew his addition, by which he might be sued; and therefore 28 H. 6. 2. b. the defendant pleaded that he was a Merchant, & *non generosus*, and it was holden good.

Judgment was given for the defendant.

I was of Counsel for the defendant.

Case 186.

Walter *vers.* Drew & al'. In C. B.

Upon a devise, that if William the eldest son of the testator should happen to die

THIS was an action of Ejectment upon the demise of *Richard Weeks*; and upon the trial at the assizes in *Cornwall* before Mr. Baron *Price*, the case appeared to be this:

without issue, that then, and not otherwise, after William's death, the estate was to go over to his son *Richard* and his heirs, it was holden that William took an estate tail by implication. 2 Eq. Abr. 315. pl. 23. 343. pl. S. C. Vin. Abr. Tit. *Devise* (R. a.) pl. 20.

Richard Weeks, grandfather of the lessor of the plaintiff, being seized in fee, and having two sons, *William* his elder and *Richard* his younger son, by his will dated the 10th of *March* 1664. devised in these words:

It is my will, that if William Weeks my son shall happen to die, and leave no issue of his body lawfully begotten, that then in that case, and not otherwise, after the death of the said William my son, I give and bequeath all my lands of inheritance in Lawliffick unto the said Richard my son, to have and to hold the same, after the death of the said William, to him and his heirs.

The testator died on the 19th of *March* 1664. *William* his son and heir entered, and in *Michaelmas* 1692. suffered a recovery; and by indenture dated the 30th *June* 1692. declares the uses of the recovery, to the use of *J. Foot* and his heirs, till payment of a sum of money, and then to himself and his heirs.

Afterwards by lease and release dated the 8th & 9th of *June* 1697. he conveyed the equity of redemption to *J. Foot* and his heirs, under whom the defendant claimed.

On

On the 9th of *January* 1721. *William Weeks* died without issue; and on the 12th of *November* 1715. *Richard Weeks* died, leaving *Richard Weeks* the lessor of the plaintiff his son and heir, who upon the death of *William* brought his ejectment; and the question was,

WALTER v.
DREW.

Whether he was barred by the common recovery suffered by *William*? Which was argued before Mr. Baron Price at his Chambers in *Serjeant's-Inn*.

And I insisted, that the devise to *Richard* the younger son was an executory devise; for he could not take by way of remainder, for a remainder cannot be without a particular estate; but here no estate is devised to *William*, but the testator suffers his estate to descend to him, and only makes a devise to *Richard*, if *William* died and left no issue of his body, and therefore *Richard* cannot take at all, if he does not take by way of an executory devise.

A man cannot take by devise, if there are not words which give the estate to him: A man deviseth to his son after the death of his wife, 2 *Leon.* (a) 226. 2 *Jon.* 98. (b) 2 *Lev.* 207. S. C. resolved that the wife took nothing.

1 P. Wms. 99.
Preced. in Chq.
382.

(a) 3 *Leon.* 132.
Godb. 16. Cro.
Elis. 15. Moore
123. S. C.

(b) 1 *Vent.* 323. 3 *Kob.* 816. 832. 1 *Freem.* 458. S. C.

And the case in *Vaugh.* (c) 259. 262. *Gardiner* vers. *Sheldon* was: a man devised, that after the death of his son and daughters without issue; and if it shall happen that my son *George*, and *Margaret* and *Katherine* my daughters die without issue, then all my freehold lands shall go to my nephew *Rose* and his heirs; and it was agreed, that his daughters took nothing at all by his will.

(c) *Supra*, p. 353.
2 *Keb.* 781.
1 *Freem.* 11.
1 *Eq. Abr.* 197.
pl. 6. S. C.

It is true, that in this case in *Vaughan* it is said, that *Rose* did not take by way of executory devise, because the estate given to him was to take effect after the death of the son and daughters without issue, which was a contingency too remote for the law to allow.

Supra, p. 65.
233.

But

WALTER O.
DEWE.

But here the contingency was to take effect upon the death of *William*, for the words are not, *if William die without issue*, but *if he die and leave no issue*, which are tantamount to saying, *if he die not having issue at the time of his death*; and this is enforced by the subsequent words, *If William die and leave no issue, then in that case and not otherwise, after the death of the said William, I give the same to Richard, to hold after the death of the said William, to him and his heirs*; by which it appears, that his intention was, that *Richard* should have the lands immediately upon the death of *William*.

No one shall take by executory devise who can take in any other way.

1 Ld. Raym. 208. 2 Saund. 388. 1 Sid. 47. 1 Keb. 119. S. C. Skinn. 431. Dougl. 264. D. acc. 1 T. R. 632.

Serjeant *Chefbyre* e contra: No one shall take by executory devise, but he who cannot take any other way, and here he may take by remainder; for by the words it appears to be the testator's intention, that *William* his eldest son should take in the first place; and I know no rule for the construction of a will, but the intention of the deviser, and here his intention is manifest that *William* should take. A man devised to his wife, and then says, *after her death my son William is to have it, and if he die, his son is to have it*; it was holden that *William* took an estate-tail. 9 Co. 127. b.

Supra, p. 292.
Infra, p. 426.

Supra, p. 299.

(a) Supra, p. 64.
83, 325.

So in *Mo.* 127. there were no words of gift, yet it was holden a good devise. So 1 *Rol.* 836. 2 *Cro.* 415. (a) And in this present case the recovery was suffered upon the opinion of Serjeant *Pemberton* and *Levinz*, that *William* by this will took an estate-tail, remainder to *Richard*.

To which the Baron inclined;

And afterwards upon further consideration gave his opinion, that *William* took an estate-tail by this will; for the words shall not be construed to give an estate by way of executory devise, but where the devisee cannot take any other way.

[375]

But here *William* took by the will, for it is a necessary implication, that he shall have it to him and his heirs of his body, for the heir shall take by the will though he is not expressly named, or there be no devise to him by express words.

As 9 Co. 128. A devise to the wife for life, and after her decease *William* is to have it, and if he die his son is to have it.

WALTER W.
DREW.

It was adjudged that *William* took an estate-tail.

So no devise expressly to the son, yet he took. *Mo.* 127.
1 *Rel.* 836. 2 *Cro.* 415.

Term. Sanct. Mich.

10 Geo. I. In C. B.

Case 187.

Walker *vers.* Lester.

The plaintiff in the record of *Nisi Prius* omitted the words *Et præd' quer' scilicet*; but it was holden amendable by the original record. *Supra*, p. 250. and the cases there cited.

THIS was an action of debt for money lent at a play called *All-Fours*.

The defendant pleaded *Nil debet*.

The plaintiff in the record of *Nisi Prius* omitted the words *Et præd' quer' scilicet*.

And after trial before King Chief Justice in *Suffex*, and a verdict for the plaintiff, judgment was arrested. And now the plaintiff moved, that the record of *Nisi Prius* should be amended by the original record. And *per Cur'*, it shall be amended, for the omission was only the misprision of the clerk; 2 *Cro.* 502. *Harrison's case*, and 1 *Salk.* 51. are cases as strong as the present case.

Case 188.

Walker *vers.* Priestly. In C. B.

In covenant, the plaintiff by his replication assigns several breaches, to which the defendant does not rejoin; though the plaintiff cannot waive the breaches, (being entered on the roll) yet he may take judgment for want of the rejoinder. *Cowp.* 357. *Doug.* 49. 2 *Term Rep.* 388.

THIS was an action of debt upon a bond, which upon oyer appeared to be conditioned for the performance of covenants.

The defendant pleads covenants performed.

The

The plaintiff replies, and assigns several breaches.

WALKER &
PRIESTLY.

The defendant did not rejoin; upon which the plaintiff signed judgment.

And now Serjeant *Chefhyre* moved to discharge the judgment, for that the plaintiff had not executed a writ of inquiry; for the plaintiff here pursues his remedy by aid of the statute 8 & 9 W. 3. c. 11. which enacts, That a plaintiff may assign as many breaches as he pleases, and the jury on trial of such action, shall and may assess not only such damages and costs as have hitherto been usually done in such cases, but also damages for such of the breaches so to be assigned as he shall prove to be broken; and if judgment shall be given on confession, demurrer, or *nihil dicit*, the plaintiff may suggest on the roll as many breaches as he thinks fit; upon which shall issue a writ to the sheriff to summon a jury to appear before the justices of assize or *Nisi Prius*, to inquire of the truth of every one of these breaches, &c. and therefore, when he takes the benefit of the statute to assign several breaches, he ought to pursue the direction of the statute throughout; and as the defendant did not rejoin, he ought to have taken out a writ of inquiry, &c.

Sed non allocatur; for the plaintiff has his election to proceed upon the statute or at common law; and therefore when the defendant *Nihil dicit in barram*, or confesses the action, or demurs, the plaintiff may suggest upon the roll several breaches, but there is no necessity for it; and when the defendant pleads, and the plaintiff by his replication assigns several breaches, to which the defendant does not rejoin, though the plaintiff cannot waive the breaches assigned, (for by the practice of the Court they must be entered upon the record) yet he may take judgment for want of a rejoinder, and need not inquire of the several breaches assigned; for this writ is not a writ of inquiry before the sheriff, but before the Justices of *Nisi Prius*, which would be a very great delay to the plaintiff.

Cafe 189. Keld & al', Assignees of Cholmley, Bailiff of the Liberty of Whitby in the County of York, *vers.* Harding. In C. B.

Where a bailiff is charged directly with a tort, it ought to be shewn that he is bailiff of a liberty who has the return of writs; but otherwise it is sufficient to shew generally, that he is such a person who has authority to take bail.

THIS was an action of debt upon a bail-bond in the penalty of 200*l.* and the declaration alledged, *quod cum Jana Hudson post Trin. 1706. (viz.) 30 Maii 8 Geo. — apud Whitby infra libertat' præd' per H. Cholmley tunc capital' sen' libertat' de Whitby præd' arrestat' fuit virtute cujusdam warranti per tunc vic' com' Ebor' eidem capital' ballivo libertat' præd' direct' super breve de cap' ad respond' e cur' de Banco emanat' & eidem vic' com', &c. direct' pro captione ejusdem Jana, ita quod idem vic' com' præd' haberet corpus ejus coram just' apud West' a die Sancti Mich' in tres sept' prox' ad resp' Ric', Johanni & Will'o Keld in placito transgr' ac etiam in placito debiti super demand 100*l.* eademque Janâ in custod' præd' H. Cholmley virtute brevis & warrant' præd' existen' ipsa & W. Hill & Th. Harding def' 30 May 8 Geo. — per præd' script' obligat' concessit se teneri, &c. præd' H. Cholmley tunc ballivo libertat' præd' per nomen officii sui in præd' 200*l.* for her appearance, &c.*

Sed præd' Jana non comperuit, per quod, &c.

The defendants demurred to the declaration, and the plaintiff joined in demurrer.

And it was objected by Serjeant *Wynne*, first, That it does not appear when the writ issued, and the writ ought to be fully shewn, for the party may say *Nul tiel record*. *Sed non allocatur*; for it is sufficient to shew it genetally; the statute (a) 4 & 5 *Anna* says, If any person shall be arrested, &c. by any writ, bill or process issuing out of any of her Majesty's Courts of *Westminster*, at the suit of any common person, and the sheriff or other officer, taketh bail, &c. and here it appears, that the writ issued out of the Court of Common Pleas against *Jane Hudson* at the suit of the plaintiff in placito transgr' ac etiam in placito deb' 100*l.* and though it did not

(a) St. 4 Ann.
c. 16. sec. 20.

not appear when it was tested, though it was objected that that was necessary, the Court did not seem to think it of any weight, for it shall not be presumed to have any irregular tests.

KELD &
HARDING.

Secondly, That it is not said, that the warrant was under the seal of the office of the sheriff. *Sed non allocatur*, for it was not the warrant of the sheriff if it was not under the seal of his office.

Thirdly, That it does not say, that a warrant was made by the sheriff. *Sed non allocatur*; for she could not be arrested unless a warrant had been made out.

Fourthly, That the bail-bond was given to the bailiff of the liberty, and not to the sheriff, and it does not appear that he had any return and execution of writs, &c.

And *prima facie* it shall be presumed that every place in a county is under the sheriff.

By the stat. 2 *Edw. 3. cap. 12.* Hundreds and Wapentakes shall not be severed from the county.

And by the stat. 14 *Edw. 3. cap. 9.* they are re-annexed to the county.

And 4 *Inst. 267.* says, That all grants of the bailiwick of a hundred since those statutes are void. So *Cro. Car. 330. Myn vers. The Bailiff of the Liberty of the Dean and Chapter of Westminster*, in an action for an escape, it was resolved, that the declaration did not shew of what liberty the defendant was Bailiff, or that he had execution and return of writs, and was therefore bad, for that ought to be shewn expressly. So in an action on the case by the bailiff of a liberty against the sheriff for entering into his franchise. (a) 1 *Vent. 399.*

Skin. 41.

(a) 2 Keb.
747. S. C.

So if a warrant to a bailiff of a liberty is pleaded, it is shewn that he had return, &c. of writs. *Lutw. 594. Sed non allocatur*; for though where a bailiff is charged directly with a tort, it ought to be shewn that he is bailiff of a li-

KELD v.
HARDING.

berty, who has *Returna brevium*, yet here it is sufficient to shew generally that he is such a person as had authority to take bail.

And by the statute 23 H. 6. c. 10. the sheriff, under-sheriff, sheriff's clerk, steward or bailiff of a franchise, servant, or bailiff or coroner, are restrained from taking under colour of their office more than 4*d.* for a return or copy of a panel, &c. then in the clause which relates to taking bail, it is enacted, That the sheriff and all other officers, as aforesaid, shall let out of prison all persons by them arrested, &c.

And that no sheriff, nor any the officers or ministers aforesaid, shall take any obligation for any cause aforesaid, but only to themselves, of any person, nor by any person in their ward, &c. but by the name of their office, &c. And therefore the bailiff of a franchise has power to take a bail-bond, and must take it to himself, and by the name of his office.

And by the stat. 4 & 5 Anne, cap. 16. the sheriff or other officer who takes bail may assign, &c. So the question here remains, Whether it does not sufficiently appear by the declaration, that H. Cholmley, to whom the bond was given, was bailiff of a franchise.

And the Court were of opinion that this appeared to a common intent.

For it is said that the plaintiffs are assignees of H. Cholmley, cap' ballivi libertat' de Whitby.

That Jane Hudson was arrested at Whitby, infra libertat' prad', per prad' H. Cholmley adtunc cap' ballivum libertat' de Whitby.

That Jane Hudson being in his custody gave the bond to him, eidem H. Cholmley adtunc cap' ballivo libertat' prad' existen' per nomen officii sui prad', &c. And therefore judgment was given for the plaintiff.

Acherly and his Wife, Sister and Heir of Case 190.
 Thomas Vernon, *vers.* Bowater Vernon &
al. In Canc'.

THOMAS Vernon by his will dated the 17th of January 1711. devised to Mary his wife 1000*l.* *per ann.* for her life, to issue out of his real estate, his capital messuage in Hanbury, &c. To Elizabeth his sister 200*l.* *per ann.* for her life; and 1000*l.* to Letitia her daughter for her portion; and after other legacies he devised the residue of his real and personal estate to Roger Acherly, George Vernon, George Wheeler, J. Bencroft and Richard Vernon, and their heirs, executors and administrators, on trust to vest the residue of his personal estate in lands of inheritance, and that his trustees should stand seised and possessed of his real and personal estate to the uses of his will during his wife's life, and after her decease, if he should die without issue, to the intent that his freehold and leasehold estate, and the lands to be purchased, should be settled to the use of the defendant Bowater Vernon for ninety-nine years.

A codicil signed and published in the presence of three witnesses, was holden a re-publication of the will, and that both made but one will.
 3 Bro. P. C. 107. S. C. Pow. on Dev. p. 658. 664.

Then to his first and other sons in tail male, &c.

Thomas Vernon purchased several fee-farm rents, assart rents, and other lands and tenements; and then by a codicil dated the 2d of February 1720. being two days before his death, he recites,

That he made a will dated the 17th of January 1711. and then says,

I hereby ratify and confirm the said will, except in the alterations hereafter mentioned.

*The portion to my niece Letitia, daughter of my sister Acherly, shall be made up 6000*l.* and what I have given to my sister and niece shall be accepted by them in satisfaction of all they may claim out of my real and personal estate, and on condition they release all*

[382]

ACHERLY v.
VERNON.

right, &c. to my executors and trustees in my will nam'd; and thus having provided for my sister and niece, I devise all the lands by me purchased since my will to my trustees and executors in my will named, to the same uses and subject to the same trusts to which I have mentioned to devise the manor of H. and the bulk of my estate.

And I revoke that part of my will whereby I appoint Roger Acherly, Geo. Vernon and Edward Vernon, three of my trustees in my will; and I desire my brother Fran. Keck and John Nichols to be two of my trustees, and devise my said real estate to them accordingly.

2 P. Wms. 335.
3 P. Wms. 168.
1 Ves. 443-489.
Dougl. 716, 717.
2 Vern. 209.
722.
Cowp. 160.

Lord Chancellor Macclesfield on the 20th of November 1723. decreed, that the will was confirmed by the codicil; that the testator signing and publishing his codicil in the presence of three witnesses was a republication of his will, and both together made but one will; and by the said will and codicil his fee-farm rents, assart rents, and lands contracted to be purchased, and all his real and personal estate (except the copyhold purchased before his will) did well pass.

The plaintiff appealed to the House of Lords.

First, For that the fee-farm rents and assart rents being purchased since the will made, the words of the codicil (*all my lands, &c.*) are not sufficient to pass them.

Secondly, The words of the codicil do not extend to the lands which the testator had agreed to purchase, but were not conveyed to him.

Thirdly, The devise to the new trustees, without saying *and their heirs*, gives them only an estate for life.

[383] Fourthly, That no trust of the new purchase being expressly declared after the death of the trustees, they shall re-
sult to the heir.

2 Vern. 209.
722.
3 P. Wms. 168.
Proceed. in Ch.
441.
Fest. 193.

Fifthly, That the codicil being by a separate and distinct instrument, does not amount to a republication of the will.

But

But the decree was affirmed.

ACHERLY
VERNON.

And in the argument, as to the republication, four cases were cited for the plaintiffs.

First, *Lytton (a) vers. Viscountess Falkland*, which case was this:

(a) 1 Eq. Abr.
210 pl. 18.
3 Ch. Rep. 169.
2 Vern. 621.
Douglass 35.

1 Bro. P. C. 229.

Sir *William Lytton* by his will dated the 25th of *March* 1700. devised all his lands to his nephew *Lytton Strode* and his heirs, and directed, that he should take the surname of *Lytton*; and his personal estate he devised to Dame — *Ruffell* his sister, and *Lytton Strode*, and made them executors.

After his will made, Sir *William Lytton* purchased the equity of redemption of some mortgages in fee, which were mortgaged to him before he made his will.

And on the 13th of *January* 1704. by a codicil attested by three witnesses, he says,

I make this codicil, which I will shall be added to, and be part of my last will which I have formerly made.

And the Lord Chancellor *Cotterell*, assisted by Sir *John Trevor* Master of the Rolls, Lord Chief Justice *Trevor*, and Mr. Justice *Tracy*, on the 16th of *June* 1708. decreed, that this was not a republication; for since the statute (b) 29 Car. 2. there can be no devise of lands by an implied republication; for the paper, in which a devise of lands is contained, ought to be re-executed in the presence of three witnesses.

There can be no implied republication of a will. Comp. 50. Infra p. 385.

(b) S. 29 Car. 2. c. 3. sec. 6.

[384]

Second, *The Attorney General vers. Barnes (c) 3 Ch. Rep.* 150.

(c) Gilb. Rep. 5. Preced. in Ch. 270. Pow. on a Vern. 597.

Dev. 103. 1 Eq. Abr. 97. pl. 7.

ACHRELY v.
VENNON.

Third, The case of Serjeant *Maynard's* will. He by his will dated the 6th of *March* 1689. written with his own hand, signed by him, but not before any witnesses, devised lands, &c. He afterwards wrote a codicil, with his own hand upon the same paper, and signed it, and it was attested by three witnesses.

1 Burr. 550.
Pow. on Dev.
304.

And the question was, Whether this was a republication of the will, so that the lands mentioned in the will should pass by it.

And upon a trial at bar a special verdict was found, but no judgment was ever given, because the will was established by Act of Parliament.

Dougl. 35.
Prec. Ch. 440.
1 Burr. 550.
Pow. on Dev.

Fourth, *Penbroke* vers. *Lord Lansdown & al'*, in ejectment, *Hill. 1 Anne, Rot. 620.* a special verdict was found,

304. 2. Eq. Abr. 768. 10 Mod. 96.

That *John* Earl of *Bath* by his will dated the 11th of *October* 1684. only executed, took notice, that his lands were settled upon his sons *Charles* and *John* in tail male, and then devised in these words,

In case my sons shall have no issue male, then for the preservation of my name and family, I devise my said lands unto my brother Bernard Granville and the heirs males of his body issuing.

Bernard Granville died in the life of the testator, having issue the defendant *George*, then *Lord Lansdown*, by which the devise to *Bernard Granville* in tail male lapsed. On the 15th of *August* 1701. the testator sent for seven persons, and said, *I sent for you to be witnesses to my will, and sometimes to be witnesses to the republication of my will;* and then took a codicil dated the 15th of *August* 1701. in one hand, and the will in the other, he said, *This is my will, whereby I have settled my estate, and I publish this codicil as part thereof;* and then signed the codicil (which lay upon the table with the will) in the presence of the witnesses, who subscribed it in his presence,

By this codicil he devised in these words, *Whereas I heretofore made my will dated the 11th of October 1684. which I do not intend wholly to revoke, but in regard to the many accidents and alterations to my family and estate, I by this codicil, which I appoint to be taken as part of my will, devise as follows, and then devised divers manors, &c. to his son Charles and his heirs, and 100 l. per annum to his nephew, then Lord Lansdown, for life.*

ACHERLY v.
VERNON.

He then put the will and the codicil together in a sheet of paper, and sealed them up in the presence of the same witnesses, but the will was not unfolded in their presence, nor did any of them write their names as witnesses on or under the will, or on the same paper, but on the codicil only.

And by *Parker C. J.* and the whole Court, this was holden no republication; for since the statute 29 *Car. 2.* there shall be no republication by implication, but the will must be re-executed, otherwise a devise of lands shall not be good. Supra. p. 383.

But at the importunity of the defendant a special verdict was found,

D E

Term. Sanct. Trin.

12 Geo. I.

Dean *vers.* Coward. In C. B.

Case 191.

A Motion was made to amend a common recovery. The case was :

A mistake in a recovery whereby two of the Vills were omitted, was allowed to be amended by the deed which had the uses.
Co. G. 2. 30.
S. C. Vin. Act.
Tit. Amendment.
(L. a.) pl. 18.

That *Richard Bigg* seized in fee, upon the marriage of *J. Bigg* his son, settled lands to the use of *John Bigg* for 99 years, if he so long lived ; then to trustees and their heirs for the life of *John Bigg* ; remainder to his first and second and other sons in tail-male, remainder to the second and other sons of *Richard* in tail male ; remainder to the right heirs of *John Bigg*.

The lands settled lay in *Sunning, Hurst, Hurley, Clewer, Wokingham, Wargrave* and *Wallingford* in *Berkshire*.

By indentures dated the 8th and 9th of *June 1696*, *Richard Bagley* cousin and heir of *Thomas Bagley* the surviving trustee for the contingent uses in the settlement, for *Richard Bigg*, and *John Bigg* the eldest son of the said *John Bigg*, in the life of the father, conveyed the lands in *Sunning, Hurst, Hurley, Clewer, Wokingham, Wargrave* and *Wallingford*, to *James Coward* and his heirs, to make him tenant to the precipe for a common recovery, which was to be to the use of *John Bigg* the father for 99 years, if he so long lived, then to trustees for 1000 years, upon trust to make mortgages by the direction of *John Bigg* the son ; remainder to *John Bigg* the son and his heirs.

In

In *Trinity Term* 8 *W.* 3. a recovery was suffered, but the Vills *Wargrave* and *Wallingford* were omitted in all the proceedings of the recovery.

DEAN G.
COWARD.

John Bigg the son by his will dated the 15th of *June* 1723. devised all his lands to his uncle *Lovelace Bigg* in fee; and *William Bigg* younger son of *John Bigg*, upon whom the settlement was made by *Richard Bigg*, claimed the lands in *Wargrave* and *Wallingford*, by virtue of the intail in the said settlement; and upon this a motion was made that the recovery should be amended by the deed dated the 9th of *June* 1696. and a rule *Nisi* granted, which in *Michaelmas* term following was made absolute; and many precedents were cited and rules produced for this purpose; particularly,

In *Trinity Term*, 13 *Car.* 1. (a) *Wrightwick* and others (a) Co. G. 30. verf. *Masters*, on the motion of Serjeant *Clarke*.

In *Michaelmas Term*, 13 *Car.* 1. (b) *Drake* and others verf. (b) Co. G. 30. *Biddulph*, on the motion of Serjeant *Heath*.

In *Michaelmas Term*, 2 *Car.* 2. (c) *Parker* and *Jolly* (c) Co. G. 32. verf. *Cotton & ux*, on the motion of Serjeant *Clarke*.

In *Easter Term*, 24 *Car.* 2. (d) *Trégeare* verf. *Nich. Gennys*. (d) Co. G. 12.

In *Michaelmas Term*, 4 *W. & M.* *Grange* verf. *Treby*, on the motion of Serjeant *Pemberton*.

Term. Sanct. Mich.

13 Geo. I. In Scacc'.

Case 192.

The King *vers.* Clark.

An extent shall go for the King's money against any one who imbesils it, but not where money due to the King is paid, and his security cancelled before a bond was given by a deputy to his principal for the balance in his hands.
Bunb. 251.
S. C.

Edward Paunceford, being appointed cashier to the Commissioners of Excise, employed *Nich. Clark* to be his billman or receiver, who by his obligation of the 14th of *March* 1715. was bound to the King in 1000 *l.* with a condition to satisfy, pay and deliver each day unto the said *Edward Paunceford*, his agent, executors or assigns, all such sums, bills, bonds, notes and other papers, as the said *Nich. Clark* should receive by virtue of any bills of exchange, notes, &c. relating to the excise, or on any account belonging to his Majesty, or to the said *Edward Paunceford* on his own account, and should due accounts make with the said *Edward Paunceford* of or concerning any bills of exchange, &c. belonging to his Majesty, or relating to the said *Edward Paunceford*, and should follow all such orders, &c. as he should receive from the said *Edward Paunceford*, &c.

And by another obligation of the same date *Nich. Clark* and others were bound to the King in 500 *l.* upon condition to the same intent and purpose.

Upon the motion of the Attorney General, and an Affidavit that *Nich. Clark* had received 1876 *l.* arising from the revenue of the Excise, and had paid only 398 *l.* and the residue

1478 *l.*

1478 l. was by him embezzelled and converted to his own proper use, and that a commission of bankruptcy then was awarded against him, it was ordered by the Court, that a writ of extent should immediately be awarded, to extend the estate and effects of the said *Nich. Clark*, bearing date the 26th of *October*, (which was the day of the motion) but that it should not be executed till four days after notice given to him and the commissioners of bankruptcy.

KING v.
CLARK.

And then it was moved to discharge this order, because it did not appear, that the debt to the King remained due; and it was shewn by Affidavit, that the King was paid all his dues by *Edward Paunceford*, who settled accounts with *Clark*, and took his obligation for the ballance, and paid all the debt due to the King; and on the 3d of *July* 1724. had the bond restored to him, which the said *Edward Paunceford* had given to the King; and it was insisted, that this obligation was made for the benefit of *Paunceford* himself, and the King's prerogative ought to be used only for the King's debts. In *Hard. 404*. It is said by Chief Baron *Hale*, that it would be unreasonable, inconvenient and mischievous to the subject, to make the King's prerogative instrumental for obtaining the debts of the subject; and by a rule 3 *Jac. 2. 1687*. no extent shall issue where a bond is not due and brought into Court, and an Affidavit made, that the debt to the King is still due; and it was also said, that an extent shall not be upon an obligation with condition, without a *Scire facias*. *Sav. pl. 95. 2 Leon. 55. Owen 46. S. C.*

And on the other part it was insisted by the Attorney General and others, that an extent shall issue upon a bond, as here; and so it was adjudged in 1721. between *The King* and *Yale*, (a) referred to the Chief Justices *Pratt* and *King*, and afterwards affirmed in parliament, where the condition was to the same effect as this is; if a man be bound to the King with sureties, and the principal prove insolvent, upon which the sureties pay the debt to the King, it would be very mischievous if they could not have the prerogative process against their principal.

(a) Bunb. 58.
2 Bro. P. C.
375. S. C.

If

KING V.
CLARK.

If monies due to the King are delivered to a common carrier, who loses or embezzles them, extents shall issue against him for the recovery of these monies; and if the receiver die indebted to the King, and his executors pay the debt, they shall have the prerogative process for the recovery of the debts due to their testator; as to the case *Hard. 404.* it was mentioned by Chief Baron *Hale* in regard of debts in aid, and the rules made 3 *Jac. 2.* were never inrolled, and regard only extents in aid. But it was never doubted before, that if a man be indebted by bond to the King, an extent might issue before it be proved that the debt remains unsatisfied.

And it was agreed by the Court, if a man be a receiver for the King, and employ others as his agents or deputies, that he can take their obligation in the King's name for the King's monies which shall come to their hand, and to me (1) it seems that it was never denied that if it be added to the condition that they shall account also to the receiver for the proper monies that they have received, that this should not vitiate, but if the obligor imbezils or converts the King's monies, an extent shall be issued upon such obligation.

It was also agreed, that if a common carrier imbezil the King's monies, an extent may issue against him; so if the principal debtor to the King fail, and his sureties pay, it was agreed by Baron *Carter* and myself, and not denied by the others, that the sureties shall have the prerogative process against the principal.

But in the principal case this rule was discharged, upon consideration chiefly of the circumstances of this case; for when this obligation was made in 1715, by which *Nath. Clark* was bound to pay each day such sums, &c. as he should receive, the monies then due were converted by him many years past; and after an account was settled between *Paunceford* and *Clark*, and the monies due to the King by *Clark* were

(1) Sir John Comyns was this Term made a Baron of the Exchequer. *Bunb. 221.*

paid by *Paunceford*, and he had his security given to the King cancelled and restored to him, and then took an obligation of *Clark* for the balance upon that account, so that he did not rely upon the bond given by *Clark* to the King.

KING v.
CLARK.

And the Chief Baron added, that by the condition of the obligation *Nath. Clark* was not bound to pay to the King or account to the King for the monies by him received, but to pay to *Paunceford* and account to him, not only for the King's monies, but also his own proper monies, and therefore the King's name seems to be used solely on trust for *Paunceford*, but the King cannot be trustee for another person.

[391]

1 Vern. 169.

Evans vers. Viscountess Dowager Fauconberg.
In Scac'.

Cafe 193.

THIS was an action of debt for rent, and the plaintiff declared, that by (1) an indenture of the 27th of September 1723. he demised to the defendant a messuage in *Bond-Street* for seven years at 160*l. per Ann.* by virtue of which demise the defendant entered, and was from thence in possession to the day of the feast of the Anunciation of the blessed *Virgin*, in 1726, and for a year's rent due at the said feast this action was brought, &c.

If a defendant plead *Nil habuit in Tenementis* to an action of debt for rent brought upon an indenture of lease for seven years, it is a good cause of demurrer.

Cro. Eliz. 362.

Co. Litt. 47. b.

2 Ld. Raym.

1550. 2 Str. 817. S. C.

The defendant pleaded, that before the demise, viz. on the 24th of January 1722, the plaintiff was possessed of the same messuage for the term of 99 years to come, and the same day assigned his term to *Anne Colwell*, who afterwards, viz. on the 25th of July 1723. entered, and was and is still in possession;

(1) If the demise is by *Deed Poll*, or by *Parol* the defendant may plead *Nil habet in Tenementis*. Co. Lit. 4; b. Lib. Plac. 153. 2 Vent. 251 Lord Holt determined, in the case of *Chestl. v. Pound*, reported in 1 Ld. Raym. p. 746.

which was an action of debt for rent on a demise in writing, that the defendant might give *Nil habuit in Tenementis* in evidence upon *N. l. debet* pleaded, because the plaintiff had never been in possession.

EVANS v.
FAUCONBERG.

and this she is ready to prove ; to which the plaintiff demurred, and shewed for cause that the plea doth not confes and avoid, nor deny the matter in the declaration, that it doth not shew expulsion of the defendant, and that it is argumentative, &c. The defendant joined in demurrer.

And it was argued by Serjeant *Whitaker*, that the plea is a special *Nil habuit in tenementis*, and therefore the plaintiff ought to have replied, and relied upon the estoppel, and not demurred. *Co. Ent.* 103. *Hob.* 206. And perhaps the plaintiff had an interest, and therefore the defendant might confes and avoid. *Co. Lit.* 47. b. *Cro. Eliz.* 700. *Sed non allocatur* ; for upon a plea of general *Nil habuit in Tenementis* the plaintiff might demur, where the estoppel appears in his declaration. 3 *Lev.* 146. 1 *Salk.* (a) 277. *A fortiori* in a special *Nil habuit*, &c. and the defendant here does not shew that the plaintiff had an interest which could be avoided, and also the defendant did not answer to the possession as she ought. 2 *Vent.* 67. And therefore judgment was given for the plaintiff.

[392]

(a) 2 Raym.
2154 S. C.

Case 194.

Bokenham *vers.* Bentfield. In Scacc'.

A plea of the statute 13 Eliz. c. 20. for non residence was allowed to be good when pleaded to a bill brought by a lessee for tithes. *Bunb.* 211. 3 *Burn's E. L.* p. 296. *Cowp.* 129.

THIS was a bill by the lessee of the parson of — for tithes against the defendant, a parishioner ; to which the defendant pleaded the statute 13 *Eliz. c.* 20. by which it was enacted, That no lease of any benefice or ecclesiastical promotion with cure, or any part thereof, shall endure any longer than while the lessor shall be ordinarily resident, and serving the cure of such benefice without absence above 80 days in any one year, but that such lease immediately upon such absence shall cease and be void, &c. and that the lessor was absent above 80 days in such year, whereby his lease to the plaintiff did become void ; and the plea being admitted to be heard according to the rules of Court, no one then appeared to defend or maintain the title of the plaintiff, for it was said by the Counsel for the defendant that such plea was formerly allowed,

allowed, that it was allowed on the 5th of *February Hil.* 12 Geo. in the case between (a) *Mills* and *Etheridge*.

BOXENHAM v.
BENTFIELD.

(a) Bumb. 210.

That it was allowed also *Pasch.* 12 Geo. in the case between (b) *Quilter* and *Missendine*, and between *Quilter* and *Lowndes*; that the sole question in those cases was, if the defendant should not answer to the quantities and values alledged by the bill at the same time that he tenders his plea, so as where the defendant insists on a *Modus* as a discharge of his payment of tithes in specie, yet the defendant ought to answer to the quantity and value of the tithes charged in the bill; otherwise if it were afterwards found that there was no such *Modus*, the plaintiff cannot have a decree against the defendant, because it does not appear how much is due by him for his tithes to the plaintiff. But it was then resolved by the Court, that upon such plea of non-residence of the lessor the defendant need not answer to the quantities and values, for such plea goes to the right and title of the plaintiff, but where a *Modus* is alledged, that admits the title of the plaintiff to take tithes of the defendant, but only goes to the manner of payment, if tithes should be paid in specie, or not.

(b) Gilb. Rep.
228. 2 Eq. Abr.
73. pl. 21.
Bumb. 211.

[393]
Gilb. 229.

And upon all those authorities alledged, the plea in the present case was allowed.

Harrison *vers.* Hart and Franks. In Scacc'. Case 195.

THIS was a bill for an account of the produce of 20,000 *l.* *South-Sea* stock transferred by the plaintiff to the defendant *Hart*, for the security of 70,000 *l.* and interest, and after deduction of principal and interest, that *Hart* pay the ballance to the plaintiff, and also that the defendant *Franks* shall account to the plaintiff for the said 70,000 *l.* which was paid to him to be disposed of for the use of the plaintiff.

An account was directed for all monies received on the sale of stock pledged, notwithstanding the day of redemption was past; it not appearing that the defendant had sufficient stock at the day.
2 Eq. Abr. 6.
pl. 15. S. C.

And the bill suggested that the plaintiff applied to the defendant *Hart* on the 25th of *May* 1720, for a loan of 30,000 *l.*

HARRISON v.
HART and
Another.

who advanced that sum to the plaintiff, and for security the plaintiff agreed to give his bond, and also to transfer to him 10,000 *l. South-Sea* stock, and accordingly the plaintiff was bound the 25th of *May*, 1720 in a penalty of 60,000 *l.* under the condition that the plaintiff should pay to *Hart* 30,000 *l.* on the 25th of *September* next with interest, after the rate of 5 *l. per cent.* being the same sum mentioned in a defeazance of the same date made between the plaintiff and the defendant *Hart*.

[394]

That on the same day the plaintiff transferred to the defendant *Hart* or his order 10,000 *l. South-sea* stock, and by a defeazance dated the 25th of *May* 1720. between the defendant *Mrs Hart* on the one part, and the plaintiff *Thomas Harrison* on the other part, reciting the said obligation and transfer, it was agreed that the 10,000 *l.* stock so transferred was transferred to the intent that the same should and might remain and be as and for a collateral or further security for the more sure payment of the said sum of 30,000 *l.* according to the condition of the said bond.

And by the same deed, the defendant *Hart* covenants that if the plaintiff should pay the said 30,000 *l. &c.* he would on the payment of the said sum transfer the said 10,000 *l.* stock to the plaintiff and deliver up the bond.

And the plaintiff covenants that he will pay all calls, &c. upon the said stock, till payment of the money becomes due, and authorises the defendant (if money be not paid) to sell and dispose absolutely of the said stock, and keep the monies arising by the sale towards the payment of the said sum of 30,000 *l.* interest and charges, returning the overplus, which the defendant agrees to do.

And it is agreed that all gains, dividends, interest and advantage, which shall arise by reason of the said stock in the said company from the date hereof, shall be for the only use
and

and benefit of the plaintiff, unless default shall be made in the payment of the said 30,000 *l.* &c.

HARRISON v.
HART and
Another.

And if the stock of the Company, before the 30,000 *l.* shall grow due as aforefaid, shall fall in value, so as to be sold at or under the rate of 350 *l.* *per cent.* in *Exchange-Alley*, the plaintiff on three days notice shall give further security, &c. or in default thereof it shall be lawful for the defendant *Hart* to sell the said stock, and keep the money arising by the sale towards the payment of the said 30,000 *l.* though not then due, according to the bond, returning the overplus, if any, to the plaintiff.

That the defendant on the 10th of *June* 1720 advanced 40,000 *l.* more to the plaintiff who gave his bond in 80,000 *l.* with condition to pay, &c. on the said 25th of *September* and another defeazance was executed in the same terms as the former, save that a power of sale was given if stock lessened to 500 *l.* *per cent.* &c. That the defendant *Hart* afterwards disposed of this stock for great prices, for which he ought to account; that the whole 70,000 *l.* was paid into the hands of the defendant *Franks*, for which he ought to account to the plaintiff.

[395]

The defendant *Hart* by his answer confesses the loan of 30,000 *l.* on the 25th of *May* 1720. and the bond and defeazance accordingly; and another loan on the 10th of *June* 1720. and the bond and defeazance accordingly; and faith, that he hath, and always had in his own hands, or in the hands of others in trust for him, sufficient stock to answer the plaintiff's demands, which the defendant kept on purpose, without making any sale or disposition thereof, ready to be transferred to the plaintiff or his order, when he should require, on his payment of the 30,000 *l.* and 40,000 *l.* and interest, &c.

And by his second answer to the original bill, and three other answers to the amended bill it appears, that on the 25th

HARRISON v.
HART and
Another.

of May 1720. when the first loan was made the transfer of the first 10,000 *l.* by the plaintiff was in this manner.

2000 <i>l.</i> was transferred to <i>Benj. Collier</i> for 9600 <i>l.</i>	} <i>l.</i>	24,040
2000 <i>l.</i> to <i>Rob. Sawbridge</i> at 482 <i>l. per cent.</i> 9640 <i>l.</i>		
1000 <i>l.</i> to <i>Wolfe</i> ——— at 480 <i>l. per cent.</i> 4800 <i>l.</i>		

5000 <i>l.</i> to the defendant <i>Hart</i> himself, who paid to the plaintiff only	} 5960

30,000

That on the second loan on the 10th of June 1720. the transfer of the second 10,000 *l.* *South-sea* stock was made by the plaintiff in this manner, viz. 1000 *l.* to *Robert Mann* at 745 *l. per cent.*

	For 7450 <i>l.</i>	} <i>l.</i>	22,200
1000 <i>l.</i> to Count <i>Nassau</i> , at 735 <i>l. per cent.</i> , for 7350 <i>l.</i>			
1000 <i>l.</i> to <i>John Mark</i> , at 740 <i>l. per cent.</i> , for 7400 <i>l.</i>			

That the remaining 7000 <i>l.</i> was transferred by the plaintiff, or order, to <i>Moses Hart</i> , who paid.	} 17,800

40,000

[396]

And it appears by the depositions of *James Travers* and *Benjamin Periam*, two witnesses examined in the cause, that *Moses Hart* had raised by the sale of the 20,000 *l.* *South-sea* Stock transferred to him by the plaintiff on the 25th of May and on the 10th of June 1720. the full sum of 86,291 *l.* 17 *s.* 8 *d.* $\frac{3}{4}$

Viz. By sale of 5000 <i>l.</i> to <i>Collier</i> , <i>Sawbridge</i> and <i>Wolfe</i> ,	} 24,040

By sale on the 30th of May 1720. of 4000 <i>l.</i> to <i>Jac. Sawbridge</i> , at 525 <i>l. per cent.</i> , of which 3659 <i>l.</i> 4 <i>d.</i> was the plaintiff's stock, (for he had only 340 <i>l.</i> 19 <i>s.</i> 8 <i>d.</i> of his own proper stock) the sum of	} 19,026 17 8

43,066 17 8

	l. s. d.	HARRISON v. HART and Another.
Brought over	43,066	17 8
By sale on the 3d of June 1720 of 500 l. stock of the plaintiff's at 520 l. per cent', (for the defendant had then no other stock in his own name)	2700	

By sale on the 10th of June, as above, to Mann, Count Nassau and Mark,	22,200
--	--------

By sale on the 15th of June 1720. to William Dale 500 l. at 750 l. per cent. for M. Hart had not stock in his own name, only 1000 l. purchased of Lord Grimston for 8000 l. of which he had sold 100 l. to Cha. Goodwin, and 400 l. to Bart. Zolocaj're on the 10th of June 1720. and then sold 1000 l. to William Dale, of which 500 l. must be of the plaintiff's stock,	3750
--	------

By sale on the 15th of June to Hen. Hankey 1000 l. at 700 l. per cent',	7000
---	------

By sale on the 20th of June to William Bateman 500 l. at 765 l. per cent',	3825
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And to Jo. Baker 500 l. as 750 l. per cent',	3825
Total 86,291 17 8 $\frac{1}{2}$	

So by the depositions of the same witnesses it appears that the defendant *Moses Hart* had in his own name upon the 25th of May 1720. no stock, except 340 l. 19s. 8 d. and the annuity stock.

[397]

That upon the 25th of September 1720, he had no stock in his own name, except 20,885 l. 1 s. 7 d. and the annuity stock.

That 4400 l. part of the 20,885 l. 1 s. 7 d. was pledged to Hart by Lord Hillborough.

HARRISON &
HART and
Another.

That 9100*l.* another part of the same, appears to be in trust for the *South-sea* Company; for on the 16th of *September*, 1720. the sum of 48,140*l.* was delivered to *Hart* by *Robert Knight*, Cashier to the *South-sea* Company, with an intent to purchase stock for the use of the Company, and that *Hart* with this sum made a purchase of 9100*l.* *South-sea* Stock, and on the 27th of *September* 1720. 9100*l.* of this stock was transferred by *Hart* to the *South-sea* Company.

So by the depositions of *William Walmsley*, another witness, it appears, that Lord *Newburgh* said to him on the 24th of *August* 1720. in *Exchange Alley*, that *Hart* had purchased 2000*l.* *South-sea* Stock for him of *Isaac Fernandez Nunes* at 850*l.* *per cent'*, to be transferred the next transfer day after *Michaelmas*, and for his security upon the 26th of *August* 1720. the aforesaid Lord transferred to *Hart* 1000*l.* *South-sea* Stock in trust for himself, and in a short time after the expiration of the time to perform the bargain the said Lord *Newburgh* gave satisfaction to *Hart*, who detained the 1000*l.* stock in part thereof.

By the deposition of Sir *William Stopleton* it appears, that on the 23d of *June* 1720. he purchased of *Hart* 1000*l.* *South-sea* Stock, and of *Walter* 600*l.* *South-sea* Stock, at 1000*l.* *per cent'*, which *Hart* took to himself upon the 27th of *September* at 400*l.* *per cent'*.

[398] By the deposition of *Tho. Edwards* it appears, that *Hart* upon the 20th of *August* 1720. purchased for him 500*l.* *South-sea* stock, at 800*l.* *per cent'*, and kept it in trust for him for two years following, when *Hart* took the same Stock for part of the monies due to him by *Edwards*; which several parcels of stock, *viz.* 4400*l.* 9100*l.* 1000*l.* 1500*l.* and 500*l.* with the *Midsummer* dividend for the two last parcels, amount to 16,810*l.* and reduce the stock, which the defendant *Hart* had in his own right upon the 25th of *September* 1720. to 4075*l.* 1*s.* 7*d.*

By the deposition of *Geo. Harrison*, brother to the plaintiff, it appears, that upon the 19th of *August* 1720. *Hart* contracted

tracted to sell him 1000*l.* *South-sea* Stock at 910*l.* *per cent*^s, to be transferred to him within a month after the next opening of the books, and deposited for security of his performance of the contract one subscription receipt of the value of 3000*l.* and *Hart* also had contracted to deliver to the Lord *Newburgh* the 2000*l.* stock mentioned in the deposition of *William Walmsley* for 850*l.* *per cent*^s. upon the 22d of *September* 1720. and to Col. *Lumley* another 2000*l.* at the same time, and for the same price.

HARRISON v.
HART and
Another.

That by the statute (a) 6 *Geo.* enabling the *South-sea* Company to increase the capital stock, power was given to the company to take in the annuities, &c. and by a resolution of the 19th of *May* 1720. the Company agreed to make allowance for each 100*l.* of Long Annuities, subscribed before the 27th of *May* 700*l.* *per cent*^s, and 575*l.* in monies, and *South-sea* bonds, and for each 98*l.* *per annum* of the 14*l.* *per cent*^s annuities, and 511*l.* in monies and bonds.

(a) St 6. G. 1.
c. 4.

That *Hart* upon the 28th of *April* 1720. subscribed 1460*l.* *per ann.* of the Long Annuities, and 1040*l.* *per ann.* of the 14*l.* *per cent*^s, and by the hands of *Edward Harris* 200*l.* *per ann.* Long Annuities, and by the hands of *Wyndmell* the same sum, for which he was allowed 700*l.* *per cent*^s, viz.

	£.	s.	d.
For 1860 <i>l.</i> Long Annuities,	13,020		
1040 <i>l.</i> of 14 <i>l.</i> <i>per cent</i> ^s .	7428	11	5
<i>Midsummer</i> Dividend,	2044	17	1

In all £.22,493 8 6

That by an order of the *South-sea* Company, the books were not opened for the transfer of the *South-sea* stock till the 5th of *October* 1720.

[399]

And on the part of defendant *Hart* it was proved by the deposition of *Lazarus Simon*, *Moyer Wegg*, and *Isaac Franks* the other defendant, that on or about the 10th of *June* 1720. the plaintiff discoursing with the defendant *Hart* (who said, that perhaps he could not re-transfer to him at the time agreed,

HARRISON v.
HART and
Another.

the 20,000*l.* stock in other than annuity stock, having sold to others the said 20,000*l.*) declared, that he well knew that he could not have the same stock, and would be content with annuity stock, for he did not regard which stock he had, and knew well the sufficiency of the defendant.

That annuity stock was equal in value to the other, and was apprehended to be transferrable before the 25th of *September*, and some parcels were actually transferred before the said day.

And *Franks* added, that since the loan of the said sums, when stock was considerably advanced in price, the defendant *Hart* advised the plaintiff to sell all his stock, by which he would acquire a great estate, and therefore offered to him to deliver the whole 20,000*l.* stock, with the dividends, but the plaintiff refused, saying, that stock would rise to the price of 1500*l.* or 2000*l. per cent.*

And *Simon Lazarus* added, that he being directed by Sir *John Lambert*, a Director of the *South-sea* Company, to purchase stock, offered to the plaintiff to give 900*l. per cent.* for all the 20,000*l.* that *Hart* had of him, and to take the security which was given to *Hart* for it.

And *Isaac Helbert* added, that he offered to *Hart* by the order of *Knight* and *Grigby*, for all his stock, annuity stock and other stock, 950*l. per cent.* who refused to depart with all his stock by reason of his engagement with the plaintiff,

[400]

As to the defendant *Franks*, he admitted by his answer that he received for the use of the plaintiff the 30,000*l.* and 40,000*l.* of *Hart*, and such others, to whom the plaintiff transferred the 20,000*l.* stock, but saith, that he disposed of it pursuant to the orders of the plaintiff in *South-sea* stock or subscriptions, and from time to time gave to the plaintiff an account in writing how he had disposed of it, which writing the plaintiff perused, and it was left with him, and afterwards declared

declared his approbation of the account; and after all the monies disposed of for the plaintiff, a ballance of 56*l.* remained due to the defendant *Franks*, which was demanded of the plaintiff, who admitted such sum due, and promised payment; that by fire the 17th of *January* 1723. all his papers and accounts were destroyed or lost, wherefore he could not now account.

HARRISON v.
HART and
Another.

And it appeared, that *Franks* was not made defendant to the original bill of the plaintiff filed in *Michaelmas* 1721. but afterwards in *Michaelmas* term 1722. *Franks* was made one of the defendants.

And by the deposition of *Abraham Solomon*, who was employed to purchase the stock and subscriptions for the plaintiff, it appeared, that he delivered an account to the plaintiff in writing of all the sums for him expended, and of all the stock or subscriptions for him purchased in the *South-sea* Company or other Companies, and apprehended that the account was just; that the plaintiff perused them, and about two days after the delivery of each account the plaintiff declared, that he had inspected, and was satisfied; and *Abraham* and *Benedict Solomon* testify, that the plaintiff promised payment of the monies demanded as the ballance due upon those accounts to the defendant *Franks*, and the sum demanded exceeded 50*l.*

Upon this case it was insisted by the Attorney General, and other Counsel with the plaintiff, that the defendant *Hart* ought to render an account to the plaintiff for all the monies which he had raised by the sale of any part of the 20,000*l.* alleged to be transferred to him by the plaintiff, and after a deduction of the principal sums and interest, to answer for the residue of the profits to the plaintiff.

[401]

First, This seems agreeable to the nature of the transaction, for when a pledge of stock is made by the plaintiff to the defendant, it is consonant to law and reason that the defendant shall render to the plaintiff upon mutual payment of monies the stock and all the profits arising from it. If a man distrain his tenant and labour the distress, he shall give damages to the party to the value of the labour.

8 Co. 146. b.
9 Co. 11. a.
Cro. Jac. 148.
1 Leon 220.
1 Andr 65.
Gillb. Hist. p. 51.

HARRISON v.
HART and
Another.

So by the Civil Law the fruit and profit arising from a thing in pledge ought to be accounted for to the debtor, and after deduction of its principal and interest, the surplus arising from the sale of the pledge ought to be restored to him.

Domat. 1 vol. 345. De Deposito L. 3. All that shall arise or accrue from the thing which is mortgaged, or that shall aug-

(a) Domat's Civ.
Law. p. 364.

ment it, accrues to the mortgagor. So Tit. (a) 3. § 15. *Cum fortis nomine & usurarum aliquid debetur ab eo, qui sub pignoris nomine pecuniam debet, quicquid ex venditione pignoris recipiatur primum usuris quas jam tunc deberi constat, deinde si quid superest, forti accepto ferendum est.*

So in the case of a mortgage the mortgagee shall answer for all casual profits; if a man pledge a diamond for 100*l.* and it is sold for 500*l.* shall not he have an account given him of the surplus? By the Common Law he who receives a pledge has no other property in it than to detain it till his debt is paid, nor can he use or sell it. 2 *Cro.* 244. So by the Canon Law. *Lind.* 60. The Canon of Pledges saith, *Inibemus ne pignus retinere quispiam contendat postquam de fructibus sortem perceperit, deductis expensis, quoniam usura est.*

(b) 2 Eq. Abr.
6. pl. 15. in
Note.

3 Bro. P. C. 142.

And it seems to be confirmed by a resolution in this Court, in the case between (b) *Mercer* and *Tutt*, which was afterwards affirmed by Parliament upon an appeal on the 2d of March 1725. *Mercer* had borrowed 1100*l.* of *Tutt*, and for his security gave his bond for payment, and also pledged a second subscription No. 195. and it was agreed that if *Mercer* paid the money, *Tutt* should restore the subscription, and if he did not pay it, that *Tutt* might sell; afterwards *Tutt* sold the subscription; whereupon *Mercer* exhibited his bill in this Court for an account of the money raised by the sale. The defendant insisted, that he had preserved another second subscription No. 194. in lieu of that; and upon debate concerning the subscription pledged, a trial was directed, and a verdict found for the plaintiff; whereupon an account was decreed.

[402]

(c) 2 Eq. Abr.
6. pl. 15. in
Note.

So in the case of (c) *Merrick* and *Spark. Mich.* 1723, stock was mortgaged by *Merrick* for 1000*l.* the mortgagee after
this

this mortgaged it for 1200*l.* whereupon *Merrick* exhibited his bill for an account of the overplus, and an account was decreed.

Secondly, This was the exprefs agreement of the parties, for by the defeazance it is said that the stock shall be and remain a further security for payment, which shews that the intent was not that it should be sold, for then it would not continue a security, and it was pledged only as a collateral security for the obligation, which was principally intended for the security of the defendant.

Therefore by the same defeazance the defendant *Hart* covenanted upon re-payment, &c. to transfer the said stock to the plaintiff, and the plaintiff covenanted to pay all calls upon the said stock; but if the stock was intended to be sold it could not be transferred to the plaintiff, nor could there be any calls upon it; and it appears more fully by the covenant and agreement, which says that all gains, dividends, &c. arising by the said stock shall accrue to the plaintiff, and by the subsequent covenant, which shews in what cases it should be sold, viz. if it fall to 350*l.* but in that case the defendant is to account for the overplus, and when the parties expressly agreed that upon such diminution in value it shall be sold, and that in such case the defendant ought to account for the sale, it can never be intended that in any other case it may be sold without account. If the plaintiff ought to have an account of the profits which arise from the sale, when the sale was allowed by the consent and agreement of the parties, shall it be said that he is not accountable for the sale when sold by himself, and in breach of the trust reposed in him?

[403]

Thirdly, This construction of the articles is very reasonable; for if the plaintiff would sell the stock, he might have sold it himself; it would be very dangerous that he to whom the stock is pledged might traffick with it; where should the stock have been found if the defendant had become a bankrupt? Whilst the specified stock remained in his hand, the plaintiff

HARRISON v.
HART and
Another.

plaintiff in case of bankruptcy could resort to it and take the stock out of the hands of the commissioners or assignees, but if it be sold, what remedy shall he have? And it is therefore necessary that the party be strictly bound to his agreement. The agreement in writing should always be the rule of the action, but is more necessary in things which fluctuate in the manner that stock fluctuates, and is more requisite in the case of a broker, who by an act of parliament is to be sworn and ought not to intermeddle with stock, and therefore when he acts contrary, he ought to be strictly obliged to the letter of his agreement.

Fourthly, If it be said that the agreement in writing is varied by the subsequent transactions, because the plaintiff himself transferred part of his stock to others, therefore the defendant *Hart* reserved other stock for the performance of his contract. It does not appear that he apprehended the persons to whom the plaintiff transferred his stock were other than trustees for *Hart*; and the plaintiff by his answer swore that he took them to be his trustees; but if it made any variation, can an agreement in writing be varied by word?

Fifthly, as to the allegation that *Hart* reserved equal quantity of stock at all times, out of which he could answer to the plaintiff, it was agreed by Mr. *Cowper* that if the allegation was true, it was a good answer; for if a man having 10,000 *l.* takes other 10,000 *l.* on pledge, and then disposes of 10,000 *l.* only, it is not any inconveniency to the party and it cannot be known if the plaintiff's stock be transferred or his own stock.

[404]

But it was insisted, that upon the 25th of *May* 1720, the defendant *Hart* had only 340 *l.* in his own name, and upon the 25th of *September* 1720, although he had 20,885 *l.* in his own name, yet he was only trustee for others as to the greatest part of it, and the annuity stock ought not to be regarded, because it was not transferrable till the fifth of *October* 1720, and therefore could be of no use to answer the demand of the plaintiff upon the 25th of *September* preceding.

Sixthly,

HARRISON v.
HART and
Another.

Sixthly, The defendant *Hart* himself was conscious that he had sold the plaintiff's stock contrary to his agreement, and that he had not sufficient stock of the same nature whereby he could answer the plaintiff, as it appears by his varying defences and by his varying answers; for by his first answer he saith that he has always had in his own hands or others in trust for him sufficient to answer the plaintiff's demands, which he kept on purpose, without making any sale or disposition thereof, ready to be transferred to the plaintiff or his order; by which every one sees that the intent was, that the defendant should have all the while stock sufficient to answer to the plaintiff 20,000 *l.* stock pledged by the plaintiff, and that he never had sold or disposed of any part of this stock.

But by his second answer the contrary appears, for then he confesses that he had sold the plaintiff's stock immediately after the transfer to him, and that he had no stock of his own, only 340 *l.* 19 *s.* 8 *d.* which he immediately disposed of, and had no proper stock for a long time; but then by his third answer, he makes his refuge to the annuity stock, for he says, that he had subscribed in *South-sea* stock on the 28th of *April* his annuities, for which he was allowed in the *South-sea* Company 20,448 *l.* 11 *s.* 5 *d.* which with the *Midsummer* dividend was augmented to 22,493 *l.* 8 *s.* 6 *d.* and that he had also other stock in his own name to the value of 20,885 *l.* 1 *s.* 3 *d.* but upon examination it appeared that the annuity stock was not transferrable till the 5th of *October*, and that his other stock was for the most part in trust for others; and that for the residue he had made contracts for sale of that to others, so that he had no stock, or only a very small quantity of stock, upon the 25th of *September* with which the plaintiff could be satisfied; and this matter being manifest, he by his fourth and fifth answer would resort to the Act of Parliament, by which he says, that the annuity stock was in its nature transferrable from the time it was transcribed to the *South-sea* Company, by force of the statute 6 *Geo.* (a)

[405]

(a) Stat 6. Geo.
1. c. 4.

As to the other defendant, it was urged by the Attorney-General and others of Counsel with the plaintiff, that it was a plain

HARRISON v.
HART and
Another.

a plain case that *Franks*, who had received 70,000 *l.* for the use of the plaintiff, as he himself admits, should be accountable to the plaintiff for that sum.

And his pretence, that he had given the plaintiff an account each day in writing to him delivered, that does not amount to a stated account, and an account current never was allowed to be a bar to a bill exhibited in equity against any person to have an account.

And his excuse, that he had lost his books and papers by the fire *anno* — is a mere subterfuge; for although his first answer was sworn to after such fire, yet he makes no mention of his books then lost till his second answer; and if it were true, yet it is no bar to the account, only it shall be an argument for a special direction of the Court for the manner in which his account shall be taken.

But by Mr. *Reeves*, and others of Counsel for the defendant *Hart*, it was insisted, that the defendant *Hart* was not accountable to the plaintiff for the monies raised by the sale of this stock pledged and transferred to him by the plaintiff; but the bill of the plaintiff to such intent ought to be dismissed, for the arguments deduced from the canon and civil law are not material, to which stocks could not be known; but by the common law, which is the most proper guide in this case, the pawnee has a special property in the goods pledged to him, and may sell them, if it be without prejudice to the pawner. 2 *Salk.* 522. And if he be robbed, he shall have an action against the pawner for the monies lent to him, for he is not bound to take more care than of his own goods, in the case of *Coggs and Bernard*, 2 *Annae, B. R.* 2 *Salk.* 523.

[406]

2 *Ld. Raym.*
916. *Jones on*
Bailm. 80.
Bull. Ni. Pri.
71.
Supra, p. 135.

And therefore this case cannot be like a mortgage of land, which naturally produce profits, which are intended for the satisfaction of the mortgagee; but stock is only an equitable interest, out of which no profits arise, only the dividends or interest; the casual advance of the price is the effect of fancy, for it has no intrinsic value; and therefore the plaintiff who is not party or privy to the transaction in the traffick by sale
of

of the stock, as he will not be charged with any damage that *Hart* might thereby sustain, therefore he shall not answer to him for the benefit or gain.

HARRISON v.
HART and
Another.

In the case of *Mercer* and *Tutt*, the second subscription No. 194. and the second subscription No. 195. were both sold; but No. 195. was sold for a great sum; and the defendant would have given him the monies obtained by the sale of the No. 194. and placed his defence upon this, that this number was the subscription pledged to him by the plaintiff, and that being found by verdict to the contrary, the defendant was decreed to answer for the No. 195.

The cause of *Merrick* and *Spark* was a mortgage made of Land, and doth not come up to the present case; nor can any case be shewn in which the Court hath ordered an account of the disposition of stock, that was allowed to be disposable in its nature.

As to the contract in this case, it doth not appear to be the intent of the parties, that *Hart* should be restrained from the disposal of the stock of the plaintiff transferred to him.

For although stress is laid upon the words of the agreement, yet the words are not to be regarded; for it appears to be a printed form, and not drawn to answer the particular intent of the parties at this time; but by the words of the agreement it cannot be collected, that the same numerical stock should be transferred to the plaintiff upon the 25th of *September*, which was transferred by him on the 25th of *May*, without variation; the same in quantity and quality satisfies the words, the same shall remain and be as and for a collateral and further security of the said 30,000 *l.* and that upon payment, &c. he shall transfer the said stock to the plaintiff, &c. and by the same argument it may be said, that the same numerical money shall be repaid, for the words are for the repayment of the said sum of 30,000 *l.* and although *Hart* covenanted to answer for all the dividends, &c. it imports only that he shall answer for the stock given in pledge, with all augmentation of the value, for the dividends, &c. are equally allotted to all

[407]

HARRISON v.
HART and
Another.

all the stock in that company, and makes each share so much more in value ; and although liberty was given to sell the stock when the price should be diminished to 350 *l. per cent.* the intent was, that the defendant then might make an absolute disposition of all the stock which the plaintiff ought to have upon the 25th of *September*, and that then he shall account for the monies which such sale produced, not that the defendant should be restrained from negotiation with the stock of the plaintiff in the Interim.

And it cannot be collected, that the plaintiff intended to restrain the defendant from negotiation with the stock to him transferred, by any part of the transaction between them ; for the plaintiff himself on the 25th of *May* transferred 5000 *l.* stock (part of the 10,000 *l.* made security for the 30,000 *l.*) to *Collier, Sawbridge and Wolfe*, to whom *Hart* had sold some stock before ; and the plaintiff himself signed the receipt to them for the monies paid by them for the 5000 *l.* so sold ; and in the same manner the plaintiff himself on the 10th of *June* transferred 3000 *l.* part of the second 10,000 *l.* stock to *Mann, Count Nassau and Mark*, to whom the defendant *Hart* had before sold so much stock, and the plaintiff himself signed the receipt for the monies by them paid for such stock to them respectively sold ; which shews that the plaintiff knew well that his stock transferred was not to be kept by *Hart* in his own name ; and although it be then pretended that the plaintiff conceived those persons to whom the plaintiff transferred his stock to be trustees for *Hart* ; yet it seems impossible to be conceived when the stock was not only transferred to them, but they paid also for it ; and the payment was made to the plaintiff himself, who gave to them his receipt for the monies ; and it all amounts to a demonstration, that those persons could not be taken for trustees for *Hart* ; and if it be considered at what time the loan of this great sum was made to the plaintiff, without any *premium*, only the interest at 5 *l. per cent.* it cannot be imagined that the stock was intended to be useless for so long a time ; the plaintiff did not expect his stock until the 25th of *September*, and it was indifferent to him in what hands
it

it was during that time, if he had so much stock on such a day.

HARRISON v.
HART and
Another.

And the words are stronger, for it doth not say on or before the 25th of *September*, but on the 25th of *September*, and therefore if the plaintiff had so much stock transferred to him at such a time, it sufficeth; and although it be objected that the agreement in writing cannot be explained by words in evidence; yet it is always allowed to take into consideration the circumstances of the case by the exposition of a fact. Between *Wilkins* and *Elkin* an agreement was made to take a lease for nine years, and that the lessee should pay 9*l.* for rent; a trial was directed, to know the value of the land and upon that it was decreed that the lessee should pay 9*l.* a year, and not 9*l.* for the whole term; tho' the words are so in Lord *Cheyne's* case, 5 Co. 68. (a) Where a man having two sons named *John*, devised land to his son *John*; proof may be admitted to shew which son was intended. So if a fine be levied of the manor of *D.* and there be two manors of the same name. 2 *Rel. Abr.* 676.

(a) 1 Brownl.
132. Syle 293.
2 Leon. 217.
Hob. 32.

Then if *Hart* by the intent of the agreement was not prohibited the sale of the stock, so that he had sufficient to reassign to *Harrison* upon the 25th of *September*, here it appears plainly that he had sufficient at that time, for he had annuity stock sufficient without doubt; and though by order of the *South-sea* Company the stock allowed for annuities, &c. subscribed to the company, was not to be transferred till the 5th of *October*, yet it was in its nature transferrable; and then the order of the Company cannot controul. The *South-sea* Company was erected by the statute 9 *Anna*, c. 21. and every proprietor of any share in the joint stock of the company had power to transfer his share to another; then by the statute 6 *Geo.* when proprietors of annuities have subscribed, the same proprietors were to have and enjoy such shares as were allowed them by the company, in lieu of money for the annuities, &c. by them subscribed, and in respect of such shares were to be taken as members of the company, and shall in proportion

HARRISON v.
HART and
Another.

portion to the same shares be entitled to the same benefits, powers, privileges and advantages, as other members of that company ought to enjoy in respect of their shares of the capital stock; and all such proprietors from the time of their agreeing by contract, subscription or otherwise, to accept such stock in lieu of their annuities, &c. shall have credit in the books of the Company for their proportion or share in the stock of the corporation, and in all dividends and advantages to attend the same.

And therefore the annuity stock, being subscribed in the time limited by the act, ought to have all the advantages allowed by the act which the original *South-sea* stock had, and by consequence was sufficient to answer to the plaintiff for the stock pledged by him to the defendant.

But if this annuity stock was not sufficient for such purpose, yet he had other stock in his own name to the value of 20,885 *l.* 1 *s.* 7 *d.* out of which he could satisfy to the plaintiff the 20,000 *l.* by him pledged upon the 25th of *September*, 1720. and although he was under contracts with others, and had purchased part of this stock with an intent to transfer it to the *South-sea* Company, and it was transferred accordingly; yet upon the 25th of *September* all was at his disposal, and if he had transferred it to the plaintiff, no other had any demand upon it against the plaintiff, nor could pursue his remedy against the plaintiff in law or equity, to recover any part of the stock so transferred to the plaintiff; and it is not to be omitted, that it appears by several depositions, that the plaintiff himself always declared that he should be content with annuity stock.

[410]

And there is one circumstance considerable in a Court of equity, that the Defendant *Hart* had persuaded the plaintiff to sell his stock when the price was at 900 *l.* *per cent.* and had offered him to furnish all the 20,000 *l.* stock at such a time, and that the defendant *Hart* was offered 950 *l.* *per cent.* for all his stock, but refused to take that price, in regard that he was obliged to retain 20,000 *l.* for the demand of the plaintiff until the 25th of *September* 1720.

As to the defendant *Franks* it was insisted by Mr. *Lee*, Serjeant *Sheppard* and others of Counsel with him, that as to the charge that he was confederate with the defendant *Hart* it was denied by the defendant, and not proved by the plaintiff; and for all the rest upon the second charge against him, that he ought to account for the several sums which he admits to have received for the plaintiff, viz. the 30,000 *l.* and 40,000 *l.* as to that the defendant by his answer says, that he had disbursed all those sums for the use of the plaintiff, and had given to the plaintiff from time to time an account in writing how the defendant had disbursed those sums, which the plaintiff had inspected and approved, and afterwards declares that a balance of 56 *l.* remained due to the defendant *Franks* upon this account, for which sum he, the plaintiff, acknowledged himself indebted to the defendant *Franks*, and promised to pay that balance to him.

HARRISON v.
HART and
Another.

And such general answer sufficeth where the charge by the bill is so general, for the bill charges that the defendant had received those monies, and had disbursed several large sums in the purchase of *South-Sea* stock and subscriptions, but some part remained not disbursed, by which the plaintiff admits that the defendant had discharged part of those sums, and yet demands an account of the whole, and doth not specify for what part he had accounted, and for what part he had given no account.

And especially when the defendant acts as servant or agent for the plaintiff, and if the plaintiff employ his servant in the purchase of several particular things, who immediately gives an account of his expences to his master, he shall not afterwards demand an account of such particulars. And the bill in this case was not originally exhibited against the defendant *Franks*, but against the defendant *Hart* only, but afterwards when *Franks* was to be examined as a witness for *Hart*, to prevent his testimony the bill was amended, and *Franks* added as a defendant; and after his papers were lost by fire it would be very hard to require a particular account how those sums were disbursed, without charging any error or

[411]
1 Vern. 95.
136. 208.
1 Str. 480.

HARRISON v.
HART and
Another.

misprision in the particulars of the account before delivered to the plaintiff.

The Court delivered no opinion, but directed an issue to be tried.

And afterwards upon an appeal to the House of Peers, this order was repealed, and the Lords directed an account for all the monies received by *Hart* upon the sale of the stock pledged by *Harrison*, and if the principal and interest were satisfied, the residue of the monies to be paid, and that the residue of the stock not sold should be transferred to *Harrison*.

Privilege from arrest shall not extend to a person who attends his own cause, after his departure from *Westminster*. *Infra*. P. 446.

Harrison, after his attendance in Court upon the cause aforementioned, went about 3 o'clock in a coach from *Westminster* to *Chancery-Lane* with his solicitor and others, to give instructions for procedure in the cause, and there continued till 10 or 11 o'clock, and then was arrested by a bailiff upon a *Ca' Sa'*, upon a judgment in *Scire facias*, upon a judgment against him in the Court of Common Pleas; and now it was moved that he should be discharged, for each party has privilege to attend his cause, and if he be arrested in going or returning, it shall be a contempt of the Court, upon which the officer shall be punished and the party discharged; but it was not allowed; for here it does not appear that there was any contrivance by the defendants or any concerned in the cause to procure this arrest, in which case the Court perhaps will extend its power against the procurers; nor does it appear that the officer knew that he had attended his cause at *Westminster*, for his warrant was dated before the arrest, and there was another *Ca' Sa'* taken in *Trinity* term preceding, returnable in *London* where the action was brought, and a *Tessat' Cap'* afterwards in *London* the first return of this term before the *Ca' Sa'* upon which he was then taken, and the arrest here was not in his attendance upon that cause, but he had continued many hours in another place; and if the Court should discharge him, how shall the sheriffs be defended against an action for the escape? In 1 *Brownl.* p. 15. in the Case of *Wil-*

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[412]

Com. Dig. Tit. 2.
(Privilege) P.
475.

Jan and *The Sheriffs of London*, in an action for an escape, it was said, that the Court can discharge if the arrest was in view of the Court, otherwise not; and in 2 *Salk.* 544. where a man went to confess an indictment in the King's Bench, and was arrested in his journey, the Court would not discharge him, for he went of his own head; and there is a difference where a man attends upon the Court by process and when not.

HARRISON v.
HART and
Another.

Frances West and Mary West, by their Father John West Esq. Plaintiffs, and Frances Erisey, Mary West and Thomas Bar- Case 196.
rable an Infant, by his Guardian, Defendants. In Scacc'.

A BILL was exhibited in September 1725, by which it was alledged, that on a treaty of marriage between *Richard Erisey* and *Frances* the daughter of *Sir Peter Killigrew*, it was agreed by articles dated the 23d of December 1685, between *James Erisey* uncle of the said *Richard*, and the said *Richard Erisey*, of the one part, and *Sir Peter Killigrew* of the other part, that in consideration of the said marriage and 1700*l.* marriage portion, *James Erisey* would settle lands in the counties of *Cornwall* and *Devon*, to the use of *Richard Erisey* for life, without impeachment of waste, and to the heirs male of his body on the said *Frances*, to be begotten; and for want of such issue, to the heirs male of his body by any other woman; and for want of such issue to the heirs female of his body by *Frances*, and after to his heirs female by any other wife; and for want of such issue, to *Charles Vivian*, &c. with divers remainders over. And by the same articles the lands in *Devon* were to be settled to

Articles on marriage, to settle lands on husband and wife for their lives, remainder to the heirs male of the body of the husband by the wife, remainder to the heirs male of the body of the husband by any other wife, remainder to the heirs female of the body of the husband, by this wife. A settlement is made before the marriage, and said to be pursuant to the articles, where by the lands are limited to the husband for life, *sans waste*,

and with power of making leases, remainder to the first &c. son of the marriage in tail male, remainder to the first &c. son of any other marriage in tail male, remainder to the heirs of the body of the husband. There are issue two daughters, and the husband suffers a recovery, and devises the premises to his sister, the daughters may in equity compel the devisee to convey the premises to them. 2 P. Wms. 349. 2 Eq. Abr. 39. pl. 2. 3 Bro. P. C. 327. S. C.

WEST and
Others v.
ERISEY and
Others.

James Erisey for life, without impeachment of waste remainder in part to *Mary* his wife for life; remainder of the whole to *Richard Erisey* as aforementioned; and by the same articles it was agreed that *James Erisey* might nominate Counsel for settling the said estates and jointure, and that Sir *Peter Killigrew* might advise likewise with his Counsel, so that the same may be effectual in law. By an indenture dated the 23d and 24th of *March* 1685, 2 *Jac.* 2. between *James Erisey* of the first part, *Hugh Boscowen* and another trustee of the second, and *Richard Erisey* of the third part, *James Erisey* in consideration of love to *Mary* his wife, and for confirming and settling her jointure, and for love to *Richard Erisey*, and conveying and settling the lands and tenements afternamed in his name and blood, and in pursuance and performance of the said articles, conveys the lands and tenements in the county of *Devon* to the use of himself for life without impeachment of waste, then as to the barton of *Erisey*, &c. to the use of *Mary* his wife for her life, for her jointure, and in satisfaction of dower, and as to the said barton, &c. after her decease, and as to the residue of the premises from and after his own decease, to the use of the said *Richard Erisey* for life, without impeachment of waste, and from and after his decease to the use of his first and other sons to be begotten on the body of *Frances* his wife in tail male, and for want of such issue, to the use of his first and other sons by any other wife in tail male, and for want of such issue, to the use of himself and the heirs of his body on the body of the said *Frances* to be begotten; and in default of such issue, to the use of the heirs of his body, and for want of such issue to the use of *Charles Vivian*, &c. and gave power to himself and *Richard Erisey* to make leases, &c. And by an indenture of lease and release dated the 25th and 26th of *March* 1686, 2 *Jac.* 2. (which were the ensuing days) *James Erisey* settled the lands in *Cornwall* to the use of *Richard Erisey* in possession for life without impeachment of waste, with such remainders as before, and gave him power to make a jointure for another wife, and to make leases, &c. and *James Erisey* covenants for him and his heirs, that the trustees shall be seised to the same uses according to the intent of such leases and estates, and after the determination of such leases and estates, to the use of such persons,

sons, and for such estates, and in such manner, as the same lands were settled before.

WET and
Others v.
ERISEY and
Others.

In the deed of this settlement produced several lines were erased, and *memorandums* made of it.

In *April* 1686. the marriage took effect between *Richard Erisey* and *Frances Killigrew* by whom he had issue *Mary* only, afterwards married to *John West*, father of the plaintiffs; for the plaintiffs were daughters and heirs of *John West* and *Mary* his wife, the daughter and heir of *Richard Erisey* and *Frances* his wife; and in two years after the marriage *Frances* the wife of *Richard Erisey* absented herself from her husband.

After the death of Sir *Peter Killigrew* and *James Erisey*, by indenture of the 18th and 19th of *January* 1697. 9 *W.* 3. *Mary* late wife of *James Erisey* conveyed to *Richard Erisey* and his heirs, during his life, the premises settled to her for her jointure in consideration of an annuity for her life pursuant to articles between them dated the 17th of *January* 1697. and afterwards *Richard Erisey* (having the freehold of all the estate in him) did by indenture of lease and release, bearing date the 25th and 26th of *April* 1698. 10 *W.* 3. grant and convey the whole estate to two persons, to make them tenants to the *Præcipe*, in order for a fine and common recovery, and in *Easter* term 10 *W.* 3. a fine was levied and a common recovery suffered accordingly, and by that deed the uses are declared to *Richard Erisey* in fee.

After this recovery *Richard Erisey* alienated in fee several parcels of the estate, and by his will dated the 20th of *December* 1722. devised the residue of the estate to the defendant *Mary Erisey* in fee.

James Erisey who made this settlement had two brothers *Richard* and *William*; *James* died without issue, *Richard* had no issue male, but left a daughter *Mary* then alive, and *William* had issue *Richard Erisey*, upon whom the settlement was made. And now the plaintiffs *Frances* and *Mary*, infants, exhibit their bill, and by it pray, that such part of the estate as was not sold by *Richard Erisey* their grandfather may be settled upon them, according to the intent of the articles; and that the defendant, as executrix and devisee of *Richard Erisey*, shall make them

[415]

WEST and
Others v.
ERISEY and
Others.

satisfaction out of her personal estate for the value of the estate sold by him in his life-time.

The defendant pleaded the marriage settlement, the fine and common recovery, the deeds which lead the uses of them, and the will of *Richard Erisey*, in bar of the relief prayed by the bills; but the plea was ordered to remain for an answer, with liberty to except to it; and then the cause was heard upon the merits. And it was insisted for the plaintiffs, that the intent of the articles was, that provision should be made for the issues male and female of this marriage; that no provision was made for issues female, only by the limitation in the articles to heirs female of the body of *Richard Erisey*; and therefore when those articles were put in execution, the settlement ought to have been made in such a manner that the issues female might have the benefit of the provision intended for them; and then the estate ought not to have been limited to the heirs female of *Richard Erisey*, by which it was in his power to bar his daughters by fine and recovery, but should have been to all and every the daughters of the body of the said *Richard Erisey* on the body of *Frances* his wife to be begotten, and then it would not have been in the power of *Richard Erisey* to bar *Mary* his daughter, to whom the plaintiffs are heirs.

That the settlement was intended in pursuance and performance of the articles, and then, when the intent is not well pursued, it ought to be rectified in equity, and the plaintiffs, who are intitled by the proper limitation, may enforce the execution of the articles; and it is the constant experience in Courts of Equity, that if the settlement in pursuance of marriage articles is contrary or defective, it shall be reformed by the Court.

[416]

(a) 1 P. Wms.

622.

9 Mod. 161.

10 Mod. 436.

1 Eq. Abr. 387.

pl. 7.

2 Eq. Abr. 505.

pl. 1.

2 Bro. P. C. 122. *Infra* p. 431.

Trevor (a) and *Trevor* in Chancery, 5 June 1719. and afterwards affirmed in the house of Peers Feb. 1719. is a case expressly to this purpose; for there by articles in 1669. made by Sir *John Trevor*, late Master of the Rolls, upon his mar-

riage

riage it was covenanted to make a settlement of lands to the value of 250 *l. per ann.* within two years, to the use of himself for his life, without impeachment of waste, and afterwards to the use of his wife for her life, and then to the use of his first, second and other sons by such wife in tail, &c. And in case no settlement was made in two years after the marriage, the persons seised should stand seised to the same uses; after the two years he suffered a recovery, and disposed of the estate by will; but all was set aside, and the construction made was, that the articles should have been executed so as not to have enabled the Master of the Rolls to defeat the children of the marriage; and although it was insisted, that by the covenant to stand seised, the estate was now executed to the limitations as expressed in the articles; it was holden, that ought to make no alteration.

WEST and
Others v.
ERISEY and
Others.

But *Pengelly* Chief Baron, *Hale*, *Carter* and *Comyns*, Barons, held that it was dangerous to set aside settlements made upon great deliberation; for though according to the case of *Trevor* and *Trevor*, if articles are made to settle an estate to a man and the heirs male of his body, a settlement in pursuance of such articles will be decreed in equity to be made in common form, to him for life, and to trustees to preserve the contingent uses, and then to the first and other sons successively in tail; yet the rule does not hold with respect to females, who are less regarded, because the name of the family will not probably be preserved by them; and by these articles the daughters of this marriage are postponed to the sons of a subsequent marriage: so the bill was dismissed without costs.

2 P. Wms. p.
336. in note.

2 P. Wms. 339.

But upon an appeal to the House of Lords the decree of dismissal was reversed in *February* 1727. principally because the settlement, being expressly mentioned to be made in pursuance and performance of the articles, shewed, that the parties did not intend to vary the agreement; and the Lords held, that the expression of heirs female in marriage articles should have the same construction in favour of daughters, as heirs male should in favour of sons, especially as no other provision was made
by

[417]

WIST and
Others v.
BERRY and
Others.

by the settlement for daughters. (1) And the Lords decreed a conveyance to trustees, to the use of the appellants and the heirs females of their bodies, as tenants in common, with cross remainders to them in tail female; and the appellants were to have an account of the profits, and of the purchase money for the premises sold, and interest; the principal money to be laid out in land to the same uses, but the interest to be paid to the use of the appellants; all writings to be brought into the Court of Exchequer, and possession delivered to the appellants.

Ferne's C. R.

241.

3 Atk. 293.

2 P. Wms. 536.

(1) The same construction was made in favour of females, in the case of *Hart v. Middleburgh*. 3 Atk. 371. and in the case of *Burton v. Hastings*, Gilb. Rep. 113. Vide 2 P. Wms. p. 356. in note. In the case of *Powell v. Price*, 2 P. Wms. 536. where a different determination was given to that in the present case, there was a diver-

sity in the circumstances of the two, which the Judges noticed. In the present case there was no other provision made for the daughters; in that of *Powell v. Price*, portions were secured. Added to this the articles in the two cases were differently worded. 2 P. Wms. 549.

D E

Term. Sanct. Hil.

13 Geo. I.

Piper *vers.* Thompson. In Scacc'.

Case 197.

A *Scire facias* upon a recognizance by the bail after judgment against the principal recited the judgment in manner following, *viz.* Whereas *Thomas Piper* lately, that is to say, in *Michaelmas* term last past, recovered against — as well a certain debt upon bond, as also a sum of — shillings for his costs, &c. *in hac parte*, &c. And upon this there was a demurrer, and it was shewn for cause for that the defendant in the judgment ought not to be condemned for costs *in hac parte*, but it should have been *in ea parte*, &c.

A *Scire Facias* upon a recognizance against the bail recited the record to be *in hac parte*, instead of *in ea parte*, and it was holden immaterial. *Bunb. 228. S. C.*

And now it was moved that it might be amended, being only the misprision of the clerk which was amendable by the statute of *Jeofails* in writ original or judicial, and a *Scire Facias* was a judicial writ, and therefore 1 *Rol. Abr.* 797. S. 2. where the bail sued an *Audit Querel* and a *Scire Facias* upon it, which recited the *Audit Querel* the *Capias* against the principal in the time of Queen *Elizabeth*, and the return upon it, but recited the *Capias* to be by writ of our Lady the Queen of *England* to our sheriff greeting directed, which imports the writ should be directed to the King's Sheriff, was holden to be error in common law, but then amendable; so a writ of inquiry is amendable being a judicial writ. *Cro. Eliz.* 761. 2 *Cro.* 372. And though in 1 *Salk.* 52. (a) in the case of *Buckskin and Hoskins*, where a *Scire Facias* upon a writ of error in

(a) 3 *Salk.* 98.
2 *Ray.* 1057.
6 *Mod.* 263.
310. *Holt* 38.
762. S. C.

the

PIPER v.
THOMPSON.

(a) Holt 59.
S. C.

(b) Carth. 367.
Comb. 354.
1 Ld. Raym. 71.
Holt. 54. S. C.
3 Str. 892.
Fitz. 201. S. C.
Cowp. 426.

Supra. p. 60.

(c) Carth. 70.
S. C.

the King's Bench upon judgment in the Common Pleas *ad assignand' error' quare execution' non*, &c. in ejectment of two messuages, &c. where judgment was in ejectment of one messuage, &c. it was holden that it was not amendable, for the writ was good although improper in this case, and plea of no such record, is true; the Court by amendment ought not to make the plea false; so (a) *Vavafor* and *Baile* in the same book and folio, where in *Scire Facias* upon judgment the name of the plaintiff omitted by the defendant was not amended for there might be such judgment, but the reason of these cases shewed that in other circumstances a *Scire Facias* might be amended. *Sed non allocatur*; for it seems to me, that all which by the statute 8 H. 6. c. 12 and 15. the Judges are impowered to amend in writ original and judicial, is, what seems to them the misprision of the Clerk in affirmance of judgments, if it is not done in affirmance of judgment, it is not amendable; so a writ of error could not be amended till the statute 5 Geo. c. 13. as appears from 5 *Mod.* (b) 16. 69, &c. and what is not a misprision of the Clerk is not now amendable; and I know of nothing which was taken as a misprision of the Clerk only words of form, which ought to be added of course without information of party, which is the description of the matter of form given by Lord Coke, 5 Co. 35. b. where words which are not pursuant to that which ought to be the direction or instruction of the clerk, and therefore in a writ of inquiry, misprision, which is not pursuant to the award of the writ upon the roll can be amended, for the roll is the warrant for a writ of inquiry, which the clerk ought to pursue, as appears in the cases cited, *Cro. Eliz.* 761. 2 *Cro.* 372. so 3 *Mod.* 112. where the words *per Sacrum probor' & legalit' hom'* were omitted in a writ of inquiry; but if the roll does not warrant an amendment no misprision shall be amended; as if the Roll awarded a writ returnable on *Friday, prox' post crast' Ascension'*, a writ of inquiry of such return, although after term, was refused by the Court to be amended. 1 *Show.* 61. (c)

[420]

So in the case 1 *Rol. Abr.* 797. the *Capias* upon the roll being *tempore Eliz.* and directed to our sheriff greeting, was directed to the Queen's sheriff, therefore a recital of the *Capias* in

PETER &
THOMPSON.

in a *Scire Facias* upon *Audita Querela tempore Jacobi* might be amended by the Roll, for the *Capias* recited was not by writ of Queen *Eliz.* to our sheriff, *viz.* directed to the King's sheriff, but to the Queen's sheriff, and this appears in the same book. 1 *Rel. Abr.* 797. *f.* 1. If there be an *Habeas Corpus* to summon a jury summoned in Court late the Queen's, and a *Disfringas* was for the jury summoned in our court, judgment was reversed thereby 3 *Jac.* *fo.* 3 in dower, for the third part of one messuage, one stable, one granary, &c. a *Petit Cape*, omitting one stable was holden not amendable; an original writ, if it varies from the instructions, may nevertheless be amended, but not otherwise; and therefore it was answered by the Court that the writ was not amendable. But afterwards

It was agreed by the Court that there needed no amendment in this case, for though *in eâ parte* seemed proper by way of recital, yet when it is said *in hac parte*, that sufficeth, for it had relation to the judgment mentioned in this same writ, and therefore it might well be said that the plaintiff recovered his debt by judgment, and also his costs appointed in the judgment here mentioned, and there are precedents both ways.

Barnes *vers.* Otway. In Scacc'.

Case 198

THIS was error of a judgment in the Exchequer Chamber, returnable on the first day of parliament, *viz.* the present sessions; and now it was moved that the plaintiff in error might transcribe the record within eight days, otherwise that execution might be taken upon the judgment, and a rule was made to shew cause upon this matter; but now the rule was discharged, for by the order of the Lords in parliament on the 13th of *July*, 1678, all persons upon writs of error in parliament shall bring in their writs in 14 days after the first day of the session in which such writs shall be returnable, otherwise such writs shall not be received unless it be upon judgments given during the session, which shall be brought within 14 days after judgment given; and therefore such motion within 14 days

A writ of error to the House of Lords must be transcribed in fourteen days after the first day of the session in which such writ is returnable, unless it be upon a judgment given during the session, and then it must be in fourteen days after such judgment given.

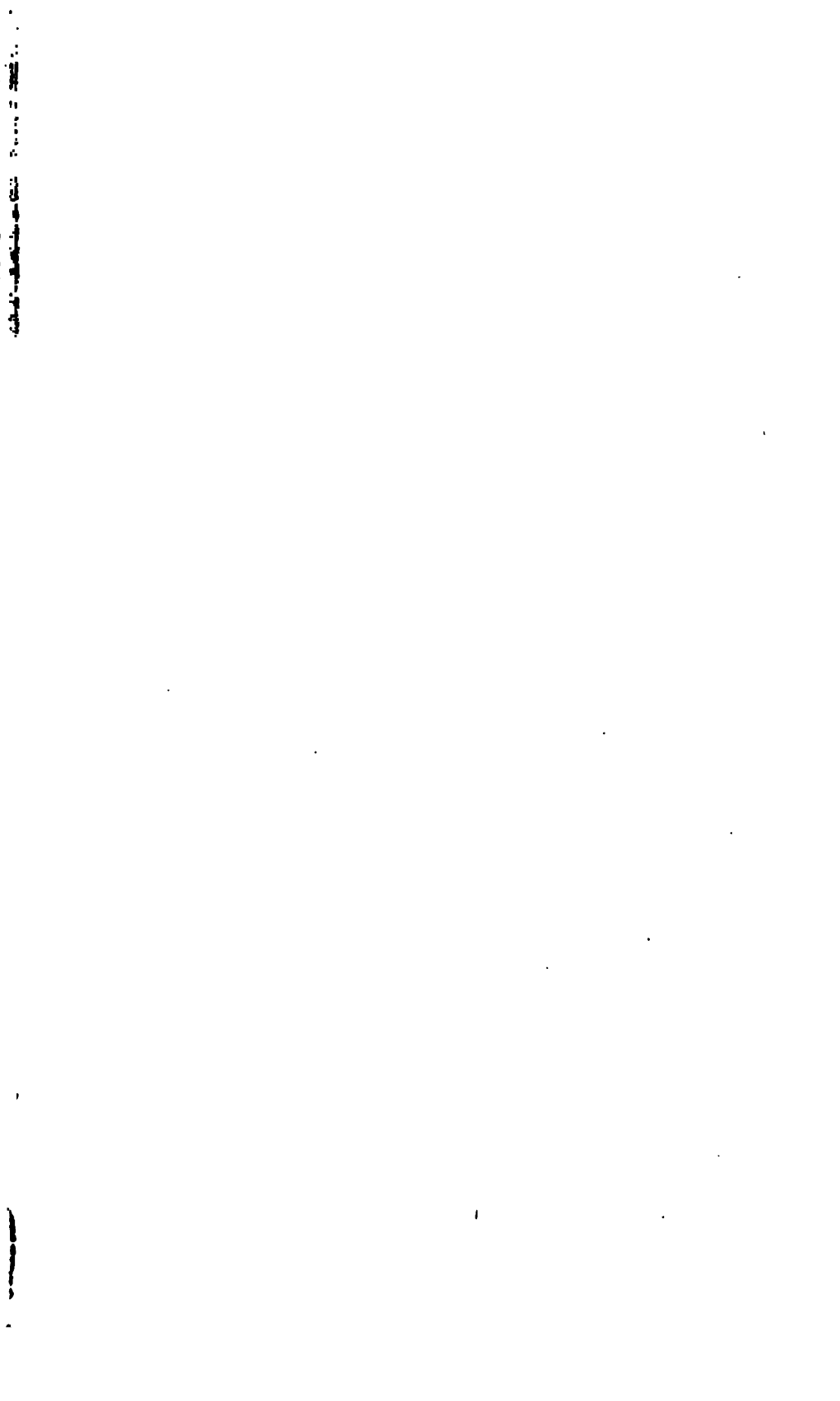
BARNES v.
UTWAY.

days after the beginning of the session is too hasty, for it is not reasonable that a plaintiff in an original cause should take execution within the time allowed by order of the Lords to bring such writ into their house ; but if the plaintiff in error should exceed the time allowed by the Lords, in such case, it would then seem reasonable that the plaintiff should be at liberty to take execution upon the first judgment ; and thus it was said to be formerly determined in this Court in the cause between *White* and *Roberts* (a).

(a) Bunb. 64.

END OF THE FIRST VOLUME.





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